Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RÜTGERSWERKE AG,

Petitioner,

v.

KAY BETTIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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November 14, 1994

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QUESTION PRESENTED

The majority opinion of *Societe National Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522 (1987), held that the Hague Evidence Convention is an optional method for the taking of discovery from foreign litigants, whose use is to be determined by the lower courts on the basis of a case-by-case analysis. Petitioner is a foreign corporation and a defendant in this environmental class action litigation. The following is the question presented as a result of the denial of Petitioner's motion to require that all discovery from it be taken pursuant to the Hague Evidence Convention:

> Whether this Court should reconsider and overrule the *Aerospatiale* majority opinion and thereby require that all discovery from Petitioner be taken pursuant to the Hague Evidence Convention for the reasons that:

(i) The *Aerospatiale* majority opinion is regarded almost universally as unsound in principle; and

(ii) The *Aerospatiale* majority opinion has been proven completely unworkable in practice by the lower court decisions, which either have followed the minority opinion or have been unable to perform the comity analysis the majority opinion requires.

LIST OF PARTIES

The following were parties to the proceeding in the court of appeals and in the district court:

1. Plaintiffs, Kay Bettis, Beverly Rittiger, William F. Slanker, Michael J. Pidgeon and Mary B. Walters, on their own behalf and on behalf of a class as certified by the district court consisting of all persons and entities (other than defendants and their affiliates) who lived on and/or owned real property abutting a plant site in Salem, Ohio and/or abutting the Middle Fork of Little Beaver Creek between the plant site and a point near Elkton, Ohio during the period of February 2, 1986 to February 2, 1990.
2. Defendant, Rütgerswerke AG.[1]
3. Defendant, Ruetgers-Nease Corporation.
4. Defendant, Nease Chemical Co., Inc.
5. Defendant, Crane Company.
6. Third-party defendant, Occidental Chemical Corporation.

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[1] A Rule 29.1 listing of all parent companies and subsidiaries (except wholly owned subsidiaries) of Rütgerswerke AG is set forth in Appendix D, *infra,* pp. D-1–D-2.

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KAY BETTIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rütgerswerke AG ("Rütgerswerke") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. A-1–A-3) denying Rütgerswerke's petition for a writ of mandamus and the opinions of the district court (App. B, *infra,* pp. B-1–B-6) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 15, 1994 (App. A, *infra,* pp. A-1–A-3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY INVOLVED

The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (including the declarations thereto of the Federal Republic of Germany) opened for signature March 18, 1970, 23 U.S.T. 255, T.I.A.S. No. 7444, 28 U.S.C.A. § 1781 at pp. 412-45 (1994) (the "Hague Evidence Convention"), is set forth in Appendix C, *infra,* pp. C-1–C-25.

STATEMENT

1. Plaintiffs' claims against Rütgerswerke.

Rütgerswerke is a defendant in this environmental class action brought in the United States District Court for the Northern District of Ohio. Plaintiffs, Kay Bettis *et al.,* purport to represent a class of persons living on and/or owning real property abutting a plant site in Salem, Ohio (the "Salem Site") or the Middle Fork of Little Beaver Creek between the Salem Site and a point near Elkton, Ohio. The bases for federal jurisdiction in the district court are 28 U.S.C. § 1331, in that plaintiffs have asserted a claim under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), and 28 U.S.C. § 1332, in that plaintiffs assert that the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between citizens of different states.

Between 1961 and 1973, defendant, Nease Chemical Co., Inc. ("Nease"), operated a chemical plant on the Salem Site. The chemical plant was closed in 1973, and no business operations have been conducted on the Salem Site since that year. In 1977, defendant, Ruetgers-Nease Corporation ("Ruetgers-Nease"), became the owner of Nease's assets including the non-operating Salem Site. Rütgerswerke, a German stock corporation with its principal place of business in Frankfurt, Germany, has been the corporate parent of Ruetgers-Nease since 1977.

Plaintiffs claim under their Second Amended and Supplemental Complaint that certain hazardous and toxic chemical substances have migrated into the Middle Fork of Little Beaver Creek from the Salem Site. Plaintiffs plead causes of action under state law and CERCLA and seek the recovery of $100 million in compensatory damages from Rütgerswerke. The sole basis for plaintiffs' claim against Rütgerswerke is their allegation that Rütgerswerke, as Ruetgers-Nease's corporate parent, is liable for Ruetgers-Nease's and Nease's alleged conduct.

2. Plaintiffs' discovery against Rütgerswerke.

Plaintiffs have indicated that they wish to take discovery from Rütgerswerke relating to issues of *in personam* jurisdiction,[2] parental liability and successor liability. Plaintiffs have served several sets of interrogatories and document production requests upon Rütgerswerke. They also

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[2] Rütgerswerke's initial response to plaintiffs' First Amended and Supplemental Complaint was to file a motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of *in personam* jurisdiction. Although it was undisputed that Rütgerswerke has had no direct contacts with the forum state of Ohio, the district court's May 19, 1992 order found that plaintiffs had made a

(footnote continues)

have served a notice of deposition for a former member of Rütgerswerke's managing board and have indicated that they intend to take several additional depositions of Rütgerswerke personnel. All of Rütgerswerke's employees who would answer the interrogatories and attend the depositions are located in Germany, as are all of Rütgerswerke's documents which would be responsive to the document production requests.

3. Rütgerswerke's motion to require plaintiffs to take their discovery pursuant to the Hague Evidence Convention.

On June 29, 1992, Rütgerswerke filed a motion for protective order which sought that any discovery from Rütgerswerke be taken pursuant to the Hague Evidence Convention. The Hague Evidence Convention, which has been ratified by both the United States and Germany, provides procedures by which plaintiffs can obtain evidence from Rütgerswerke in Germany. Under Chapter I of the Hague Evidence Convention, the district court would submit a letter of request containing the requested discovery to the German authorities, who would forward the request to a German court with jurisdiction over Rütgerswerke. The German court would then supervise the taking of evidence from Rütgerswerke. Chapter II of the Hague Evidence Convention

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(footnote continued)

prima facie showing of an alter-ego relationship between Rütgerswerke and Ruetgers-Nease which was sufficient to deny the motion at that stage in the proceeding. The district court noted that "it remains unclear at this time whether the control asserted rises to a level at which Ruetgers-Nease may be considered a mere shell, agent or alter-ego of Rütgerswerke" and that plaintiffs must make this showing by the preponderance of evidence at trial.

provides three alternative procedures for the taking of evidence abroad. These are the taking of evidence by diplomatic officers, by counsular agents and by commissioners.

On May 6, 1994, the magistrate judge denied Rütgerswerke's motion for protective order (App. B, *infra,* pp. B-1–B-4). On May 19, 1994, Rütgerswerke filed an appeal to the district judge from the magistrate judge's ruling. On June 22, 1994, the district judge affirmed the magistrate judge's decision and denied Rütgerswerke's motion for protective order (App. B, *infra,* pp. B-5–B-6). On July 6, 1994, Rütgerswerke filed a petition with the court of appeals seeking a writ of mandamus directing the district court to require plaintiffs to use the procedures specified in the Hague Evidence Convention for the discovery to be taken from Rütgerswerke. On August 15, 1994, the court of appeals entered its order denying Rütgerswerke's petition for a writ of mandamus (App. A, *infra,* pp. A-1–A-3).

REASONS FOR GRANTING THE PETITION

This Court has not hesitated to reconsider and overrule those of its decisions which have proven to be unsound in principle and unworkable in practice. *See Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546-47 (1985). *See also Payne v. Tennessee,* 501 U.S. 808, 827 (1991); *Swift & Co. v. Wickham,* 382 U.S. 111, 116 (1965). As demonstrated below, the holding of *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522 (1987), that the Hague Evidence Convention is an optional method for the taking of discovery from foreign litigants whose use is to be determined by the lower courts on a case-by-case basis, is regarded almost universally as unsound in

principle and has been proven to be unworkable in practice by the lower court decisions, which either have followed the minority opinions analysis or have been unable to perform the comity analysis the majority opinion requires.

1. The holding of Aerospatiale is unsound in principle.

The majority opinion in *Aerospatiale,* joined in by five justices,[3] held that the Hague Evidence Convention provides optional discovery procedures to be used at the discretion of the district court after scrutiny in each case of the particular facts, the sovereign interests and the likelihood that resort to those procedures will prove effective. *Id.* at 544. The majority opinion indicated that due respect should be given for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations and for any sovereign interests expressed by a foreign state, but declined to "articulate specific rules to guide this delicate task of adjudication". *Id.* at 546.

The *Aerospatiale* minority opinion, joined in by four justices,[4] criticized the majority for ignoring the importance of the Hague Evidence Convention by relegating it to an optional status, noted that experience indicated that a case-by-case comity analysis will be performed inadequately and the Convention will be invoked infrequently and predicted that the lower courts will resort unnecessarily to federal rules discovery "in a raw exercise of their jurisdictional power to the detriment of the United States' national and international interests." *Id.* at 547. The minority opinion

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[3] Stevens, J. delivered the majority opinion in which Rehnquist, C.J. and White, Powell and Scalia, JJ., joined.

[4] Blackmun, J. filed the minority opinion in which Brennan, Marshall and O'Connor, JJ. joined.

particularly disagreed with the majority opinion's case-by-case inquiry for determining whether to use the Hague Evidence Convention procedures and with its failure to provide the lower courts with any meaningful guidance for carrying out that inquiry. The minority opinion instead would have applied a general presumption that courts should resort first to the Hague Evidence Convention procedures, and that an individualized analysis of the circumstances of a particular case is appropriate only when it appears it would be futile to employ the Hague Evidence Convention or when its procedures prove to be unhelpful. *Id.*

Aerospatiale was a 5-4 decision with a minority opinion that sharply criticized the majority opinion's holding. In deciding to reconsider and reverse its precedent, this Court repeatedly has noted that a narrow margin of decision and a vigorous dissent is a factor. *See Payne v. Tennessee, supra* at 828-29, (overruling prior authority "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."); *Garcia v. San Antonio Metropolitan Transit Authority, supra* at 530 (overruling prior authority decided "by a sharply divided vote"). *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 273 (1980) (overruling prior authority decided "by only the slimmest majority").

This Court also has noted criticism by commentators as a factor leading to its reconsideration of its precedent. *See Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 47-48 (1977) (overruling precedent where "[t]he great weight of scholarly opinion has been critical of the decision . . . "); *Swift & Co. v. Wickham, supra* at 124 (overruling precedent "uniformly criticized by commentators").

Aerospatiale has caused a great deal of attention in the scholarly journals which almost uniformly criticize the majority opinion. Indeed, this petition cites more than 30 commentaries that challenge the correctness of the *Aerospatiale* majority opinion.

For example, Professor Bermann, in critiquing the *Aerospatiale* decision, has stated flatly that "the Supreme Court seriously erred on the merits . . . " George A. Bermann, *Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice: The Hague Evidence Convention and the Supreme Court: A Critique of the Aerospatiale Decision,* 63 Tul. L. Rev. 525, 529

(1989). This criticism has been shared by other academics[5], by a distinguished federal circuit judge[6], by practitioners[7] and by student commentators.[8]

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[5] *E.g.*, Russell J. Weintraub, *The Need for Awareness of International Standards when Construing Multilateral Conventions: The Arbitration, Evidence and Service Conventions*, 28 Tex. Int'l L. J. 441, 460-61 (1993) ("Comments on *Aerospatiale* have almost uniformly condemned the opinion as inconsistent with America's obligations under the Evidence Convention and offensive to other signatories. I, too, regret *Aerospatiale's* xenophobia and think that the proper approach is Justice Blackmun's . . . "); William L. Wilks & Nancy E. Goldberg, *The Unsolved Problem in Taking Evidence Abroad: The Non-Rule of Aerospatiale*, 7 Dick. J. Int'l. L. 65, 92 (1988) ("the Supreme Court was incorrect in its reasoning in *Aerospatiale.*").

[6] Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. Pitt. L. Rev. 903, 931 (1989) ("The arguments mustered against giving priority to Convention procedures are not persuasive when balanced with the overriding interests, national and international, in more effective implementation of the Evidence Convention.")

[7] *E.g.*, James G. Dwyer & Lois A. Yurow, *Taking Evidence and Breaking Treaties: Aerospatiale and the Need for Common Sense*, 21 Geo. Wash. J. Int'l L. & Econ. 439, 477 (1988) ("the Supreme Court's premises were erroneous"); Lawrence H. Minch, *U.S. Obligations Under the Hague Evidence Convention: More than Good Will?*, 22 Int'l Law. 511, 516 (1988) ("The majority opinion erroneously treats article 27 as evidence of the parties' intent to establish merely optional procedures. This interpretation reduces the Convention to a nullity.").

[8] *E.g.*, Pascal W. Di Fronzo, *The Hague Evidence Convention in the Aftermath of Societe Nationale Industrielle Aerospatiale*, 12 Hastings Int'l & Comp. L. Rev. 735, 747 (1989) ("the majority conclusion that the application of Evidence Convention procedures is 'optional' is at odds with the Evidence Convention's language and negotiation history."); Lori A. Fields, *Societe Nationale Industrielle Aerospatiale v. United States District Court: The Supreme Court Undermines the Hague Evidence Convention and Confounds the International Discovery Process*, 22 Loy. L.A. L. Rev. 217, 264 (1988) ("The Court's concern over reaffirming the sovereignty of our judicial system clouded the crucial issues in the case, and resulted in

(footnote continues)

The specific flaws in the Aerospatiale majority opinion that the commentators repeatedly have noted include the following:

(a) The majority opinion's textual analysis.

In interpreting the text of the Hague Evidence Convention, the majority opinion relies on the use of the word "may", rather than the word "shall", in Articles 1, 15, 16 and 17. Professor Weintraub states that this "focus on the Convention's use of the word 'may' rather than 'shall' to buttress the conclusion that use of the Convention is optional, is unconvincing." Weintraub, *supra* at 457. He notes that the term "may" appears in each of the four articles describing the four different methods of obtaining evidence under the Convention and that: "Given these four alternate methods of obtaining evidence, it would make no literal sense to state that any of them 'shall' be used." *Id.* at 457-58.

(footnote continued)

an inaccurate analysis of our obligations under the Hague Evidence Convention."); J. Albert Garcia, *A Look Behind the Aerospatiale Curtain, or Why the Hague Evidence Convention had to be Effectively Nullified,* 23 Tex. Int'l L. J. 269, 274 ("As it is written, the *Aerospatiale* opinion is fundamentally unconvincing."); Patricia Ann Kuhn, *Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention,* 69 B.U.L. Rev. 1011, 1013 (1989) ("the Court incorrectly decided the case"); Catherine E. Woodward, *Discovery: Application of the Hague Evidence Convention in United States Courts,* 29 Harv. Int'l L. J. 160, (1988) ("the Supreme Court trivializes the significance of this important multilateral treaty and risks offending foreign signatories to the detriment of international relations.").

Professor Bermann agrees: "the Court reads too much into the use of the term 'may' in the Evidence Convention."; Bermann, *supra* at 531.[9]

The *Aerospatiale* majority opinion also relied upon Articles 23 and 27 of the Hague Evidence Convention to buttress its conclusion that it is a permissive supplement, not a preemptive replacement, for federal rules discovery. 482 U.S. at 536-38. As one commentary has stated with regard to the majority opinion's treatment of these provisions: "Articles 23 and 27 have been grossly misunderstood." Wilkes & Goldberg, *supra* at 91.

Article 23 authorizes a contracting state to declare that it will not execute a letter of request in aid of pretrial discovery of documents in a common-law country. Professor Weintraub notes that the majority opinion's "treatment of Article 23 is especially problematic." He criticizes the majority opinion's suggestion that a signatory nation's use of this article unilaterally abrogates the Hague Evidence Convention's procedures as ignoring that this action is specifically authorized by the Hague Evidence Convention procedures

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[9] *See also* Di Fronzo, *supra* at 748 "[the majority opinion] incorrectly assumes that use of the word 'may' signifies the optional nature of the Evidence Convention."); Fields, *supra* at 269 ("Since the Convention provides three alternative methods that may be used to gather evidence abroad, the use of the term 'may' in each alternative provision seems entirely appropriate."); James T. Matthews, *The Role of the Hague Convention for Gathering Evidence Abroad: Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 107 S.Ct. 2542 (1987), 24 Stan. J. Int'l. L. 309, 319 (1987) (the Court's analysis of the Evidence Convention's 'permissive' language does not adequately support its holding that the Convention's procedures are optional."); Wilks & Goldberg, *supra* at 91 ("the permissive language only reflects the alternative methods provided by the Convention").

and as overlooking that the Hague Evidence Convention itself is the product of negotiation and compromise. Weintraub, *supra* at 458. Another commentator has noted that the majority opinion is mistaken on two counts with regard to Article 23: *First,* this article does not preclude recourse to all pre-trial discovery, but is limited by its term to the pretrial discovery of documents; and *second,* the majority errs when it states it would be anamolous for common law contracting parties to agree to Article 23, as the negotiating history demonstrates that it was the United Kingdom, a common law country, which insisted upon the insertion of this article. Di Fronzo, *supra* at 749-50.

Article 27 provides that the Hague Evidence Convention does not prevent a contracting state from (a) declaring that letters of request may be transmitted to its judicial authorities through other channels, (b) permitting any act provided for to be performed upon less restrictive conditions or (c) permitting other methods of taking evidence. Professor Bermann explains that Article 27 means that a state may use more liberal means to assist in the taking of evidence on its territory in aid of foreign litigation, and that the Hague Evidence Convention sets only a minimum standard of international cooperation, but that: "For an advocate to marshal an argument based on article 27 in support of the nonexclusivity thesis is understandable; for the Supreme Court to rely upon it, however, is not." Bermann, *supra* at 532.[10]

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[10] *See also* Di Fronzo, *supra* at 748-49 ("The majority interpreted Article 27 as proving that Evidence Convention procedures were optional. This is incorrect."); Fields, *supra* at 235 ("The history of the negotiation and ratification of Article 27 shows that the provision was directed *only* at states of execution to ensure that executing states could permit evidence to be taken in accordance with less restrictive internal procedures other than

(footnote continues)

(b) The majority opinion's analysis of the negotiation history.

As noted by one commentator: "The majority opinion ignores the historical grounds which motivated the United States to be the primary advocate of the Hague Evidence Convention." Di Fronzo, *supra* at 747. This commentator further states that:

> Given the unsatisfactory nature of transnational discovery before the negotiation of the Evidence Convention, it is incomprehensible that the nations involved would agree on procedures that could be completely ignored by a contracting state requesting evidence from another contracting state. However, this is exactly what the majority concluded by stating that the Evidence Convention procedures are 'optional'.

Id. at 748. Other commentators agree that the negotiation history of the Hague Evidence Convention does not support the majority opinion's view that it is an optional discovery device.[11]

(footnote continued)

those provided for in the Convention.") (original emphasis); Michael P. Lehutsky, *Hague Convention on Taking Evidence Abroad — Federal Rules of Civil Procedure Discovery,* 26 Duq. L. Rev. 773, 788 (1988) ("The history of the Hague Convention provides strong evidence to suggest that [the majority opinion's] interpretation [of Article 27] is incorrect"); Matthews, *supra* at 316 ("the Court clearly misinterpreted article 27, as a review of the Convention's history reveals"); Randall D. Roth, *Five Years after Aerospatiale: Rethinking Discovery Abroad in Civil and Commercial Litigation under the Hague Evidence Convention and the Federal Rules of Civil Procedure,* 13 U. Pa. J. Int'l Bus. L. 425, 446 (1992) ("that the plain language of Article 27 permits nations to use their own, more liberal procedures of discovery instead of the Convention — clearly misinterprets the Convention.").

[11] *See also* Fields, *supra* at 265 ("Although the majority purported to consider the Convention's negotiating history as well as the practical

(footnote continues)

(c) The interests of the other signatory nations and the international community.

Foreign signatory governments who have made their positions known regarding the applicability of the Hague Evidence Convention procedures "prefer either first-use of the Convention or mandatory and exclusive use of the Convention procedures." Mark A. Cotter, *The Hague Evidence Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates Changes to Federal Discovery Rules,* 6 Fla. J. Int'l L. 233, 247 (1991).[12]

(footnote continued)

construction adopted by the parties, there is a conspicuous absence of any thoughtful examination of either factor."); Kuhn, *supra* at 1036 ("Further analysis of the Evidence Convention's structure and negotiating history, however, strongly supports the view that the Convention's procedures are mandatory."); Matthews, *supra* at 319 ("consideration of the other Contracting States' negotiating goals indicates that, at a minimum, the agreement was intended to establish procedures of first resort."); Minch, *supra* at 516 ("[the majority opinion's] construction also ignores the Convention's history.").

[12] *See also* Di Fronzo, *supra* at 751 ("It is evident from the amici briefs of [other signatory nations] that Evidence Convention procedures were intended to be minimum procedures to be applied at least as a first resort, upon which international judicial cooperation was to be improved."); Minch, *supra* at 519 ("France and Germany (and probably other civil law nations who did not participate in the *Aerospatiale* case) regard the Convention's procedures as the mandatory and exclusive means by which U.S. civil litigants may seek evidence located on their soil.").

The commentators also have noted the adverse effect the *Aerospatiale* decision is having on our relations with other countries and our standing in the international community. As Professor Weintraub has stated:

> It is one thing, however, to insist on protection of important national interests, and quite another to give offense to friendly foreign countries when the objective sought could be reached through less confrontational methods. *Aerospatiale* is an unfortunate example of this latter kind of shortsighted parochialism.

Weintraub, *supra* at 477. Professor Bermann likewise has stated that:

> The fact remains that American courts would actually be aided in making proper claims for cooperation from those in control of evidence abroad if the courts adopted a more gracious, indeed more honest, reception of the Convention, than the Supreme Court has accorded it. Both by its substance and its rhetoric, the *Aerospatiale* ruling unfortunately misses an important opportunity to promote the spirit of accomodation essential to the internationalization of law and legal practice.

Bermann, *supra* at 552.[13]

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[13] *See also* Di Fronzo, *supra* at 751 ("The majority decision in *Aerospatiale* gives little weight to the danger of international confrontation and the importance of judicial cooperation."); Dwyer & Yurow, *supra* at 477 ("The parochial and arbitrary decisions that follow *Aerospatiale* are likely to heighten objections from foreign states regarding U.S. treatment of foreign nationals."); Fields, *supra* at 321-22 ("International judicial cooperation is likely to be adversely affected by the Court's decision."); Felice A. Glennon, *Taking Evidence Abroad — The Hague Evidence Convention*, 254 Suffolk Transnat'l L. J. 253, 262-63 (1988) ("the Court's decision ignored the interests of foreign states and the importance of furthering transnational cooperation."; J. Erik Groves, *Transnational Civil Litigation — The Hague Evidence Convention*, 23 Wake Forest L. Rev. 371, 398

(footnote continues)

(d) The 1989 Special Commission Report.

In the wake of the *Aerospatiale* decision, the Hague Conference on Private International Law convened in April,

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(footnote continued)

(1988) (" . . . *Aerospatiale* will stand as an affront to the other contracting States."); Kuhn, *supra* at 1048 ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."); Matthews, *supra* at 319-20 ("the Court's decision may provoke retaliation by foreign governments in the form of new restrictions on U.S. discovery."); Minch, *supra* at 527 ("increased friction with our principal European trading partners over U.S. demands for documents and information located abroad appears inevitable."); Traynham E. Mitchell, Jr., *Societe Nationale v. United States District Court: International Discovery Under the Hague Evidence Convention,* 62 Tul. L. Rev. 828, 834 (1988) ("the majority's relegation of the Convention to an optional procedure will only exacerbate the existing tensions between common and civil law systems and may destroy any incentive for civil law countries to accomodate what they perceive as intrusive American discovery procedures."); Diana Lloyd Muse, *Discovery in France and the Hague Convention: The Search for a French Connection,* 64 N.Y.U.L. Rev. 1073, 1115 (1989) ("If American courts persist in ignoring the reasonable diplomatic solution the Hague Convention represents, they will continue to erode established notions of international comity, thereby unnecessarily defeating the express purpose of the Hague Convention to alleviate such conflicts."); William R. Slomanson, *The US Supreme Court's Position and the Hague Evidence Convention,* 37 Int'l & Comp. L. Q. 391, 396 (1988) ("Construing this treaty as only one of several international discovery guidelines will further isolate the United States."); Joshua O. Stein, *Subordinating the Hague Evidence Convention to the Federal Rules of Civil Procedure: Societe Nationale Industrielle Aerospatiale v. United States District Court,* 21 Conn. L. Rev. 167, 195 (1988) ("This decision will inevitably result in accumulated resentment and decreased cooperation on the part of signatory nations that find American discovery procedures offensive."); Wilks & Goldberg, *supra* at 91 ("the Court seems to overlook the overriding national interest in promoting and maintaining international harmony, in international legal cooperation as well as other areas"); Woodward, *supra* at 160 ("the Supreme Court . . . risks offending foreign signatories to the detriment of international relations.").

1989 a "Special Commission" on the operation of the Hague Service Convention and the Hague Evidence Convention. *See Report on the Work of the Special Commission of April, 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,* 28 I.L.M. 1556 (1989) (the "Special Commission Report"). The 22 member states of the Hague Conference (including the United States), as well as diverse international organizations, sent representatives to the Special Commission. *Id.*

The Special Commission Report states that "[the *Aerospatiale*] question gave rise to the most extensive discussion of the . . . meeting." *Id.* at 17. As Professor Weintraub has noted, "One of the report's 'conclusions' . . . unqualifiedly disapproves of *Aerospatiale's* majority opinion . . . " Weintraub, *supra* at 462. That conclusion states that:

> "[With] regard to the object of the Convention, the Commission thought that in all contracting states, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.

Special Commission Report, supra at 27.[14]

The Special Commission Report provides further evidence that the *Aerospatiale* holding runs counter to the universal view held outside the United States. Indeed, one U.S.

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[14] *See also* Edwin R. Alley, *Hague Conference on Private International Law: 1989 Special Commission Meeting on the Operation of the Hague Evidence Convention and the Hague Service Convention,* 8 B. U. Int'l L. J. 187, 189-92.

court has cited the Special Commission Report as one reason mandating more liberal use of the Hague Evidence Convention. *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 120, 615 A.2d 297, 301 (1992).

(e) The proposed amendments to the Federal Rules of Civil Procedure.

Shortly after the *Aerospatiale* decision, the Judicial Conference Advisory Committee on Rules of Practice and Procedure proposed amendments to Fed. R. Civ. P. 26 which "would create a preference for internationally agreed methods of discovery when such methods are available" and to Fed. R. Civ. P. 28 which would "conform the rule to the [Hague Evidence Convention"]. Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure September, 1990 *reprinted in* 134 F.R.D. 574, 575. These were amendments which "would, in effect, overrule *Aerospatiale.*" Joseph P. Griffin & Mark N. Bravin, *Beyond Aerospatiale: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure,* 25 Int'l Law. 331, 341 (1991). This effort provides further evidence of the general dissatisfaction with the *Aerospatiale* holding.[15]

This Court decided not to transmit the amendments to Fed. R. Civ. P. 26 and 28 to Congress. *See* letter from Chief Justice Rehnquist to Speaker Foley (April 30, 1991, *reprinted in* 134 F.R.D. 526). This decision was perspicacious, as an amendment to the Federal Rules of Civil Procedure cannot

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[15] *See also* Cotter, *supra* at 248-51, Randall D. Roth, *Five Years after Aerospatiale: Rethinking Discovery Abroad in Civil and Commercial Litigation Under the Hague Evidence Convention and the Federal Rules of Civil Procedure,* 13 U. Pa. J. Int'l Bus. L. 425, 451-70 (1992); Weintraub, *supra* at 462-64.

fully overrule *Aerospatiale's* effect. Because *Aerospatiale* interprets an international treaty, its holding is fully binding upon the state, as well as the federal, courts. For example, the Texas Court of Appeals has held that because the Supreme Court's interpretation of the Hague Evidence Convention in *Aerospatiale* binds it, it could no longer follow the first resort rule. *Sandsend Financial Consultants, Ltd. v. Wood,* 743 S.W.2d 364, 366 (Tex. App. 1st Dist. 1988).[16]

Amending the Federal Rules of Civil Procedure could overrule the *Aerospatiale* decision as applied in the federal courts, but the decision would continue to bind the state courts. As Judge Friendly made clear in the context of the act of state doctrine, if the United States is to speak with one voice on matters affecting foreign relations, federal law must set the standards applicable throughout the United States:

> It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other . . . The required uniformity can only be secured by recognizing the expansive reach of the principle . . . that all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.

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[16] *See also* Aaron P. Allen, *The Hague Evidence Convention and State Courts after Societe Nationale Industrielle Aerospatiale v. U.S. District Court: Has the Supreme Court Unveiled a Federal Right?,* 11 Loy. L.A. Int'l & Comp. L. J. 207, 221 (1989) ("Since the decision in [Aerospatiale] was based on a federal treaty, the states' independent relations with foreign sovereigns are necessarily circumscribed by the Court's interpretation of that treaty"); David Westin & Gary R. Born, *Applying the Aerospatiale Decision in State Court Proceedings,* 26 Colum. J. Transnat'l L. 297, 306 (1988) ("state courts are bound to apply a comity analysis at least as deferential to foreign interests as that required of federal courts by *Aerospatiale.*").

Republic of Iraq v. First National City Bank, 353 F.2d 47, 50-51 (2d Cir. 1965), *cert denied,* 382 U.S. 1027 (1966). This Court can achieve a uniform modification of its holding in *Aerospatiale,* applicable to both the federal and state courts, only by reconsidering and overruling such holding; it cannot do so by amending the Federal Rules of Civil Procedure.[17]

2. The holding of *Aerospatiale* is unworkable in practice.

The *Aerospatiale* majority opinion requires the district courts to determine, on a case-by-case basis, whether the Hague Evidence Convention or the federal rules are more likely to protect the litigants' interests while achieving the desired discovery results. There is no doubt that this *ad hoc* balancing test has proved to be completely unworkable in practice. As one commentary has stated: "The majority opinion in *Aerospatiale* creates an undesirable and unworkable framework in which lower courts must make determinations about the appropriate use of the [Hague Evidence Convention]." Griffin & Bravin, *supra* at 349. Many other commentators, upon review of the post-*Aerospatiale* case law, likewise have concluded that the majority opinion's holding is unworkable in practice.[18]

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[17] This petition provides the Court with its first opportunity to reconsider *Aerospatiale* since the proposed amendments to the Federal Rules of Civil Procedure.

[18] *See* Born & Hoing, *Comity and the Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention,* 24 Int'l Law. 392, 394 (1990) ("the lower courts have found the *Aerospatiale* comity analysis cumbersome and unhelpful . . . "); Cotter, *supra* at 239 ("Unfortunately, lower court decisions following *Aerospatiale* illustrate the lack of guidance provided by the majority's *ad hoc* comity analysis."); Mark G. Corrado, *The Supreme Court's Impact on Swiss Bank Secrecy: Societe Nationale*

(footnote continues)

The non-workability of the *Aerospatiale* majority opinion rule is fully illustrated by the post-*Aerospatiale* lower court decisions, which are discussed below:

(a) The post-Aerospatiale decisions which have ordered Hague Evidence Convention discovery.

Since *Aerospatiale,* only three reported decisions have ordered litigants to use the Hague Evidence Convention procedures. *Hudson v. Hermann Pfauter GmbH & Co.,* 117 F.R.D. 33 (N.D.N.Y. 1987); *In re Perrier Bottled Water Litigation,* 138 F.R.D. 348 (D.Conn. 1991); *Knight v. Ford Motor Co.,* 260 N.J. Super. 110, 615 A.2d 297 (1992). The courts in these decisions "have favored the comity analysis proposed by Justice Blackmun in his *Aerospatiale* dissent." John C.

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Industrielle Aerospatiale v. United States District Court, 37 Am. U.L. Rev. 827, 835 (1988) ("the standard established in *Aerospatiale* is unworkable"); Mitchell, *supra* at 833 ("Although the Supreme Court settled the issue of the Convention's exclusivity, little else in [the majority] opinion will assist lower courts confronted with cases involving foreign nationals and discovery of evidence abroad."); David J. Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework,* 82 Am.J. Int'l L. 521, 522 (1989) ("The Court failed, however, to provide an analytical framework that could be used to achieve the goals it established. As a result, the opinion threatens to lead to conceptual chaos and may exacerbate rather than reduce current conflicts."); Mark T. Roomberg, *Societe Nationale Industrielle Aerospatiale v. United States District Court — The Hague Evidence Convention on Taking Evidence Abroad: The "Optional" Treaty?,* 3 Temple Int'l & Comp. L. J. 47, 49 (1989) ("practitioners and courts have little or no guidance in *applying* the Hague Evidence Convention") (original emphasis); Stein, *supra* at 195 ("In [*Aerospatiale*], the Supreme Court missed an opportunity to inject a measure of predictability and consistency into the American judicial approach to extraterritorial discovery"); Wilks & Goldberg, *supra* at 93 ("The line drawn by the Court was not truly a line; the rule established by the holding is truly a nonrule.").

Plaster, *The Hague Evidence Convention: The Need for Guidance on Procedures and Resolution of Conflicts in Transnational Discovery,* 27 Vand. J. Transnat'l L. 185, 196 (1994). Many other commentators have recognized the anamoly of these courts following the *Aerospatiale* minority opinion.[19]

These three courts' decisions to implement the minority opinion's analytical framework are very compelling evidence that the majority opinion's analysis is unworkable.

(b) The post-*Aerospatiale* decisions which have ordered federal rules discovery.

The remaining post-*Aerospatiale* reported decisions have ordered litigants to use the federal rules, rather than the Hague Evidence Convention, for discovery. *Doster v. Carl Schenk A.G.*, 141 F.R.D. 50 (M.D.N.C. 1991); *Roberts v. Heim*, 130 F.R.D. 430 (N.D.Cal. 1990); *Rich v. Kis California, Inc.*, 121 F.R.D. 254 (M.D.N.C. 1988); *Haynes v. Kleinwefers*, 119

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[19] *See* Bermann, *supra* at 550 ("the district court [in *Hudson*] specifically relied on the minority analysis espoused by Justice Blackmun in justifying a general rule of prior resort."); Stephen R. Bailey, *Depositions and Discovery — Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,* 54 J. Air L. & Com. 281, 300 (1988) ("[In *Hudson*] the court seemed to disregard the majority's explicit rejection of the first resort principle in [*Aerospatiale*]."); Cotter, *supra* at 240 ("[the Hudson] court, frustrated in its purported attempt to apply the majority's *ad hoc* comity analysis, relied almost exclusively on Justice Blackmun's tripartite analysis to support its comity findings."); Dwyer & Yurow, *supra* at 472 (In *Hudson* . . . the district court noted [the majority opinion's] explicit failure to offer guidance and so applied the three-part analysis which [the minority opinion] offered."); Minch, *supra* at 526-27 ("The [*Hudson*] court . . . has in fact performed a comity analysis similar to that urged by Justice Blackmun . . . "); Muse, *supra* at 1113 ("Although purporting to follow *Aerospatiale,* the [*Hudson*] court actually adopted Justice Blackmun's analysis."); Weintraub, *supra* at 465 ("*Hudson* . . . expressed a preference for Justice Blackmun's analysis").

F.R.D. 335 (E.D.N.Y. 1988); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386 (D.N.J. 1987); *In re Bedford Computer Corp.*, 114 B.R. 2 (Bankr. D.N.H. 1990); *In re Asbestos Litigation*, 623 A.2d 546 (Del. Super. 1992); *Moake v. Source International Corp.*, 263 N.J. Super. 455, 623 A.2d 263 (1993); *Erbach Finance Corp. v. Royal Bank of Canada*, 199 A.D.2d 87, 605 N.Y.S.2d 52 (1st Dept. 1993); *Scarminach v. Goldwell GmbH*, 140 Misc.2d 103, 531 N.Y.S.2d 188 (1988); *Sandsend Financial Consultants, Ltd. v. Wood*, 743 S.W.2d 364 (Tex.App. 1st Dist. 1988).

The *Aerospatiale* minority opinion predicted that the majority opinion's *ad hoc* balancing test would be unworkable because the lower courts would display a pro-forum bias toward federal rules discovery and would be unable to perform an international comity analysis. All the commentators who have analyzed the post-*Aerospatiale* lower court jurisprudence agree that this is exactly what has occurred. As one commentator has stated:

> In performing the supposedly neutral balancing test advocated by the *Aerospatiale* majority, lower courts have shown the pro-forum bias toward FRCP discovery rules and U.S. interests predicted by the *Aerospatiale* minority. Lower courts have consistently placed the burden of proving the [Hague Evidence Convention's] effectiveness on the party advocating use of the [Hague Evidence Convention]. This has proven a difficult and impractical burden to sustain. In addition, lower courts have accorded little or no weight to international comity concerns in resolving disputes about foreign discovery. Thus lower courts have applied the majority's balancing test in a manner that rarely results in use of the HEC.

Griffin & Bravin, *supra* at 336.[20]

Many of the commentators have pointed out in particular that the lower courts have been unable properly to perform the comity-balancing analysis required by the *Aerospatiale* majority opinion because the majority opinion failed to provide any guidelines for performing the analysis. As one commentator has stated:

> This case-by-case approach is unsatisfactory because it neither defines the duty of the lower courts in administering an effective treaty of the United States nor identifies the U.S. interests that require that the treaty be disregarded.

Minch, *supra* at 521.[21]

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[20] *See also* Stephen F. Black, *United States Transnational Discovery: The Rise and Fall of the Hague Evidence Convention*, 40 Int'l & Comp. L. Q. 901, 906 (1991) ("Events have proved the dissenting minority's fears more than justified. In the aftermath of *Aerospatiale*, the lower court rulings have been mainly hostile to the Convention."); Cotter, *supra* at 240 ("[The minority opinion's] prediction of a pro-forum bias in favor of using the Federal Rules instead of the Convention was borne out by lower court decisions."); Dwyer & Yurow, *supra* at 475 ("the various lower court opinions rejecting use of Convention procedures are circular and nonsensical."); Plaster, *supra* at 195 ("These decisions show the difficulty lower courts confront in applying *Aerospatiale*'s ad hoc comity analysis meaningfully. Courts, therefore, fall back on their parochial bias toward the Federal Rules.")

[21] *See also* Corrado, *supra* at 864 ("Without sufficient guidelines the federal judiciary will most likely rule in favor of American interests and cast aside the strengths of international comity: reciprocity and good will."); Di Fronzo, *supra* at 750 ("The minority opinion is also preferable to the majority case-by-case analysis, given the lack of guidelines provided by the majority to lower courts in determining whether to use Evidence Convention procedures or not."); Garcia, *supra* at 279 ("Entrusting to the lower courts a doctrine as ambiguous and potentially damaging as comity without the necessary guidance is dangerous, for it entails the risk that lower courts will compromise fundamental United States interests."

(footnote continues)

The district court and court of appeals' decisions in the instant case are paradigmatic of the lower courts' inability to perform the analysis required by *Aerospatiale*. The magistrate judge failed to give proper consideration to the three factors to be used under *Aerospatiale* in determining whether to require use of the Hague Evidence Convention (App. B, *infra*, pp. B-1–B-4). Indeed, the district judge, in ruling upon Rütgerswerke's objections to the magistrate judge's ruling, stated that: "The defendant correctly asserted that the Magistrate Judge did not use all the [Aerospatiale] criteria." The district judge nonetheless affirmed the magistrate judge's decision, although in so doing he compounded the magistrate judge's error by failing to provide any additional analysis of the *Aerospatiale* criteria (App. B,

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Groves, *supra* at 395 ("Federal courts burdened by an already heavy volume of litigation cannot be expected to adequately exercise the 'special vigilance' the Supreme Court now requires."); Owen Peter Martikan, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the Aerospatiale Decision*, 68 Tex. L. Rev. 1003, 1019 (1990) ("Although the majority in *Aerospatiale* contemplated a rigorous review by lower courts of international comity interests supporting resort to the Hague Convention, meaningful review is often lacking in subsequent lower court opinions."); Roth *supra* at 448 ("Unfortunately, the majority's particularized comity analysis fails to provide lower courts with sufficient guidance regarding when resort to the Convention is appropriate."); Paul Scott, *Extraterritorial Discovery and the Hague Evidence Convention after Societe Nationale Industrielle Aerospatiale: An American Interests Approach to Comity*, 13 Yale J. Int'l L. 366, 386-87 (1988) ("The unguided efforts of the lower courts have resulted in uncertain and unpredictable decisions of questionable fairness and utility. Unfortunately, the vague decision by the Supreme Court in [Aerospatiale] has done little to alleviate the problem.") Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 Cornell L. Rev. 101, 110 (1993) ("Most courts have avoided the delicate balancing process called for in *Aerospatiale* and have simply allocated the burden of proof to the party opposing the use of the Federal Rules.")

infra, pp. B-5–B-6). The Sixth Circuit's short opinion merely defers to the discretion of the district court (App. A, *infra,* pp. A-1–A-3). Accordingly, under the lower courts' rulings, Rütgerswerke is being required to comply with federal rules discovery in the absence of anything remotely resembling the balancing test, giving particular regard to the sovereign interests involved, which *Aerospatiale* mandated.

3. Summary.

After seven years of experience with *Aerospatiale*, it is clear that the majority opinion is unsound in principle and unworkable in practice.

Many commentators advocate the substitution of Justice Blackmun's first resort analysis for the majority opinion's *ad hoc* balancing test.[22] There is other sentiment that

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[22] *See* Bailey, *supra* at 301-02 ("the interests of international comity would be best served by requiring first resort to the Convention procedures when foreign discovery is sought"); Corrado, *supra* at 865 ("The Supreme Court should establish a rule instructing the federal courts to resort first to the discovery procedures of an international agreement rather than to the reasonableness standard established in *Aerospatiale*."); Cotter, *supra* at 254 ("now is the appropriate time for the U.S. to reaffirm its commitment to international comity and place its interpretation of the Convention on a solid treaty basis with other signatories by adopting a first-resort rule for Convention procedures."); Di Fronzo, *supra* at 754 ("A presumption in favor of the Evidence Convention is advocated when discovery is sought in civil or commercial matters in a foreign contracting state"); Glennon, *supra* at 263 ("the Court did not give adequate attention to international comity interests in holding that these procedures are not required to be the avenue of first resort."); Groves, *supra* at 397 ("the Convention, not the Federal Rules, should be the avenue of first resort."); Matthews, *supra* at 319 ("at a minimum, the agreement was intended to establish procedures of first resort."); Muse, *supra* at 1109 ("the majority in *Aerospatiale* erred in declining to require at least mandatory first resort to Hague Convention procedures to obtain documents located abroad."); *(footnote continues)*

this Court should hold that the Hague Evidence Convention is the mandatory and exclusive method for taking discovery from a party located in a foreign signatory nation.[23]

The time has come for this Court to reconsider the majority opinion in *Aerospatiale* and formulate a new rule governing the use of the Hague Evidence Convention which is both sound in principle and workable in practice.

(footnote continued)

Plaster, *supra* at 216 ("The best way to discourage lower courts' reliance on the Federal Rules is for the Supreme Court to reconsider its *Aerospatiale* decision and adopt the 'first use' rule set forth in Justice Blackmun's dissent."); Roomberg, *supra* at 66 ("the Hague Evidence Convention should be the mandatory first step in taking discovery abroad in all circumstances."); Roth, *supra* at 470 ("this Comment proposes largely incorporating Justice Blackmun's presumptive first resort approach into the Federal Rules of Civil Procedure."); Slomanson, *supra* at 397 ("The United States should adopt [Justice Blackmun's] 'first resort' approach to the Hague Evidence Convention."); Stein, *supra* at 168 ("American courts should employ Convention procedures as a first resort in all cases where those procedures would not clearly be futile.); Weis, *supra* at 931 ("A prerequisite of resort to the Convention would drastically minimize conflicts with foreign nations without abrogating the right of the district courts to apply the Federal Rules when the Convention route is ineffective."); Roger C. Wilson, *The Hague Evidence Convention in U.S. Courts: Aerospatiale and the Path Not Taken, Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 107 S.Ct. 2542 (1987), 17 Ga. J. Int'l & Comp. L. 591, 602 ("the Supreme Court bypassed a less rigid alternative and unnecessarily diminished the Convention's stature in American courts: a requirement of first *consideration* of the Convention for foreign discovery.") (original emphasis).

[23] *See* Kuhn, *supra* at 1064 ("the Convention, by its terms, provides mandatory procedures for obtaining evidence abroad.").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A
No. 94-3703

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: RÜTGERSWERKE AG
Petitioner.

ORDER

Before: JONES and BATCHELDER, *Circuit Judges;* and JOINER, *Senior District Judge.**

The petitioner, Rütgerswerke AG, is a German corporation which is named as a defendant in environmental class action pending in the district court. In this petition for a writ of mandamus, Rütgerswerke asks this court to rule that all discovery requests made of it must be pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, 28 U.S.C.A. §1781 (West 1994). As a preliminary matter, Rütgerswerke asks this court to direct formal briefing on this issue and invite the Federal Republic of Germany to file an *amicus curiae* brief. The plaintiffs have moved to dismiss the petition on grounds that relief in mandamus is not appropriate to seek reversal of a discretionary decision of the district court. Rütgerswerke has moved to strike the motion to dismiss, arguing that it is an unauthorized attempt to respond to its petition on the merits. We deny the motion to strike. It is noted that this court may deny a petition for a writ of mandamus in the absence of any formal response. *See* Fed. R. App. P. 21(b).

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* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

The extraordinary writ of mandamus is used "to confine an inferior court to a lawful exercise of its authority when it is its duty to do so.'" *Will v. United States,* 389 U.S. 90, 104 (1967) (citations omitted). Only exceptional circumstances amounting to a judicial usurpation of power justify granting the writ. *Id.* Mandamus may be available to review a discovery order which raises "questions of unusual importance necessary to the economical and efficient administration of justice." *FDIC v. Ernst & Whinney,* 921 F.2d 83, 85 (6th Cir. 1990) (citations omitted). However, mandamus is generally not available to control a district court in the exercise of discretionary duties. *In re American President Lines, Ltd.,* 929 F.2d 226, 227 (6th Cir. 1991)(order), (citations omitted).

In the instant case, the law is clear that the terms of the Hague Convention on the Taking of Evidence are optional. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court,* 482 U.S. 522 (1987). The Supreme Court has not articulated specific guidelines for the application of the Hague Convention, but has indicated that the trial court must determine in each case based on the factors present in that case whether discovery against a foreign party shall proceed under the Hague Convention or the federal civil rules. *Id.,* at 546. The district court has made that determination in the instant case, and Rütgerswerke's petition does not establish a clear and indisputable right to relief in mandamus as a result of the district court's decision. Although Rütgerswerke asks that briefing be ordered in this matter, if this court is of the opinion that a writ of mandamus should not be granted, it shall deny the petition. Fed. R. App. P. 21(b). We conclude this case is not appropriate for relief in mandamus.

It therefore is ORDERED that the petition for a writ of mandamus is denied. The plaintiffs' motion to dismiss is denied as moot.

ENTERED BY ORDER OF THE COURT

/S/ LEONARD GREEN
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KAY BETTIS, *et al.*, *Plaintiff* v. RUETGERS-NEASE CHEMICAL CO., INC., *Defendant*	Case No. 4:90CV0502 Magistrate Judge David Perelman Judge George W. White MEMORANDUM OPINION AND ORDER

At the status conference held May 4, 1994 this Court orally advised counsel that the motion of defendant Rutgerswerke seeking a protective order requiring the plaintiffs to use the procedures specified in the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters for discovery to be taken from Rutgerswerke would be denied. This Court further stated, however, that such denial did not mean that Rutgerswerke was obliged to respond to all of the interrogatories and requests for production of documents presently outstanding, and that if and/or when a motion to compel came on for ruling the parameters of the discovery to be allowed would be judged very carefully. This ruling is entered to confirm that oral advice.

As the parties recognize, whether discovery in a given case is to be controlled by the Federal Rules of Civil Procedure or by the Hague Convention rests in the discretion of the trial court. *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522 (1987). In deciding in which direction that discretion is to be exercised the court

should look to "the particular facts [of the case], sovereign interests, and likelihood that resort to those procedures will prove effective." *Id.* at 544.

In concluding that the Federal Rules of Civil Procedure provide the preferable mode of discovery herein, this Court has looked to the nature of the claim asserted against Rutgerswerke and the nature of the evidence which the plaintiffs must adduce to establish that claim.

The plaintiffs' theory of liability as regards Rutgerswerke is that it exercised such a degree of control over the day-to-day affairs of its American subsidiary Ruetgers-Nease Chemical that it may, and should be, held responsible for the discharge of pollutants from a Superfund site occupied by Ruetgers-Nease.

It is plain that in order to prove such allegation the plaintiffs must be able to explore through discovery both the basic relationship between Rutgerswerke and Ruetgers-Nease and the more detailed manner in which that relationship was implemented on an operational basis. It is equally plain that such a relationship will, to a significant extent, be reflected in documents generated by each of those entities, and/or flowing between them.

Rutgerswerke's motion acknowledges that under the Hague Convention "Germany will not execute letter of requests for pre-trial document production" (Reply Memo. p. 8). It is however argued that which plaintiffs might need at trial documents can be identified through pre-trial discovery and can be ordered produced during the trial proceeding. It is further argued that many of the documents in question have been, or can be, secured through Ruetgers-Nease.

In this Court's opinion, identifying documents pretrial for production at trial is simply not a feasible alternative. Not only is such approach inconsistent with the concept of full pre-trial discovery, so that the parties can properly prepare for trial, it would result in a substantial impediment to an orderly trial.

This Court does find merit in the contention that duplicative discovery should not be allowed. That problem, however, can be dealt with by regulating discovery under the Federal Rules.[1]

Although this Court does not believe that this is an appropriate case for application of the Hague Convention, this Court intends to regulate discovery bearing in mind the Supreme Court's admonition in *Aerospatiale* that the factor of sovereign interests calls upon the courts to recognize that "Some discovery procedures are much more 'intrusive' than others," 482 U.S. at 545, and that, although declining to insist upon the use of Convention procedures, "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke," *id.* at 546. At the pretrial this Court offered counsel some

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[1] For example, in the document discovery requests to Rutgerswerke there are a number of items calling for unredacted copies of documents produced in redacted form during the deposition of a Ruetgers-Nease employee. At the status conference this Court advised plaintiffs' counsel that such production would not be ordered, for the reason that amotion to compel could be brought against Ruetgers-Nease in order to obtain unredacted copies.

general thoughts as to where, in this case, the line between reasonableness/unreasonableness may be found, and trusts that they will be guided accordingly.

Defendant's third motion for a protective order is denied.

IT IS SO ORDERED

/s/ DAVID S. PERELMAN
DAVID S. PERELMAN
United States Magistrate Judge

Date: May 6, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KAY BETTIS, *et al.*, *Plaintiff* v. RUETGERS-NEASE CHEMICAL CO., INC., *Defendant*	Case No. 4:90CV502 Hon. George W. White MEMORANDUM AND ORDER

On May 6, 1994 the Magistrate Judge filed a Memorandum Opinion and Order ruling that Defendant Rutgerswerke AG's motion for protective order be denied. This matter is before the Court upon this Defendant's appeal from the Magistrate Judge's decision pursuant to 28 U.S.C. § 636(b)(1)(A).

The United States Supreme Court held in *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522 (1987) that the Hague Evidence Convention is applicable to discovery in civil cases. It set forth three factors to be used in determining whether to require use of the Hague Evidence Convention. These are: the particular facts of each case, the sovereign interest involved and whether resort to the Hague Evidence Convention would be an effective discovery device. 482 U.S. at 544. The Defendant acknowledged that the Magistrate Judge recognized these factors but contends that he misapplied one of the three factors and did not consider the other two. It is argued that failure to give proper consideration to the three factors renders the Magistrate Judge's report and recommendation clearly erroneous or contrary to law requiring modification.

Whether or not discovery is to be governed by the Federal Rules of Civil Procedure or by the Hague Convention rests in the discretion of the trial court. *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. at 544. The Defendant correctly asserted that the Magistrate Judge did not use all the *Societe* criteria. However, modification of the Magistrate Judge's order is not necessary as long as it is not clearly erroneous or contrary to law.

Under the Hague Convention, Plaintiff would not be able to obtain documents before trial. The Court agrees with the Magistrate Judge that production of documents during trial is not feasible. It would interfere with the Plaintiff's ability to prepare for trial and also impede efforts to conduct an orderly trial.

The Magistrate Judge recognized that Germany has a sovereign interest in how evidence is conducted and wrote that he intends to regulate discovery accordingly. Furthermore, this Court notes that the Defendant has been conducting discovery under the Federal Rules of Civil Procedure to its benefit. Plaintiff should not be precluded from obtaining discovery in the same manner.

Accordingly, the Court finds that the decision of the Magistrate Judge denying defendant Rutgerswerke AG's motion for protection order is not clearly erroneous or contrary to law. The decision of the Magistrate Judge is **affirmed**. The Defendant's motion for protective order is **denied**.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
GEORGE W. WHITE
United States District Judge

APPENDIX C

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose.

Desiring to improve mutual judicial co-operation in civil or commercial matters.

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions —

* * *

CHAPTER I — LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify —

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia —

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in

the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence —

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that —

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State or origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so.

When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II — TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if —

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if —

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for

appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence —

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is

taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal for the person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III — GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process

necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from —

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from —

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [99 British Foreign and State Papers 990] and the 1st of March1954 [286 UNTS 265], this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date,

inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following —

(a) The designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Conventions for the State concerned. At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following —

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorised [sic] thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Done at The Hague March 18, 1970; entered into force for the United States October 7, 1972. TIAS 7444; 23 UST 2555

States which are parties:
Argentina[1]
Australia[2]
Barbados[3]
Cyprus[4]
Czech Republic[5]
Denmark[6]
Finland[7]
France[8]
Federal Republic of Germany[9]
Israel[10]
Italy[11]

Luxemburg[12]
Mexico[13]
Monaco[14]
Netherlands[15]
Norway[16]
Portugal[17]
Singapore[18]
Slovak Republic[19]
Spain[20]
Sweden[21]
United Kingdom[22]
United States[23]

[9] "A. The Government of the Federal Republic of Germany makes the following declarations in accordance with paragraph 1 of Article 33 of the Convention of 18th March 1970:

> "The Federal Republic of Germany makes the reservation provided for in the first sentence of paragraph 1 of Article 33 of the Convention excluding the application of the provisions of paragraph 2 of Article 4 of the Convention. Letters of Request to be executed under Chapter 1 of the Convention must, in accordance with paragraphs 1 and 5 of Article 4 of the Convention, be in the German language or be accompanied by a translation into that language.
>
> "The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter II of the Convention

that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.

"**B.** The Government of the Federal Republic of Germany makes the following declarations pursuant to Article 35 of the Convention of 18th March 1970:

"(1) The authority competent to execute a Letter of Request shall be the local court (Amtsgericht) in whose district the official act is to be performed.

Letters of Request shall be addressed to the Central Authority of the Land in which the respective request is to be executed. The Central Authority pursuant to Article 2 and paragraph 2 of Article 24 of the Convention shall be for

Baden-Württemberg	das Justizministerium Baden-Württemberg (The Ministry of Justice of Baden-Württemberg), D 7000 Stuttgart
Bavaria	das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 München
Berlin	der Senator für Justiz (The Senator of Justice), D 1000 Berlin

By Note of 29 September 1992 the following central authority was designated

Brandenburg	Das Ministerium der Justiz des Landes Brandenburg D-0-1561 Potsdam

Bremen	der Präsident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen
Hamburg	der Präsident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg
Hesse	der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden
Lower Saxony	der Niedersächsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover

By Note of 29 September 1992 the following central authority was designated

Mecklenburg — Western Pomerania	Der Minister für Justiz, Bundes-und Europaangelegenheiten D-0-2754 Schwerin
Northrhine-Westphalia	der Präsident des Oberlandesgerichts Dusseldorf, D 4000 Düsseldorf
Rhineland-Palatinate	das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz
Saarland	der Minister für Rechtspflege (The Minister of Justice), D 6600 Saarbrücken

By Note of 29 September 1992 the following central authority was designated

Saxony	Das Sächsische Staatsministerium der Justiz D-0-8060 Dresden

By Note of 29 September 1992 the following central authority was designated

Saxony-Anhalt	Das Ministerium der Justiz des Landes Sachsen-Anhalt D-0 3037 Magdeburg
Schleswig-Holstein	der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land of Schleswig-Holstein), D 2300 Kiel

By Note of 29 September 1992 the following central authority was designated

Thuringia	Das Justizministerium Thüringen D-0-5082 Erfurt

"(2) Pursuant to Article 8 of the Convention, the Government of the Federal Republic of Germany declares that members of the requesting court of another Contracting State may be present at the execution of a Letter of Request by the local court if prior authorization has been given by the Central Authority of the Land where the request is to be executed.

"(3) The taking of evidence by diplomatic officers or consular agents pursuant to paragraph 1 of Article 16 of the Convention which involves nationals of a third State or stateless persons shall be subject to permission from the Central Authority of the Land where the evidence is to be taken. Pursuant to paragraph 2 of Article 16 of the Convention, permission shall not be required if the national of the third State is also a national of the State of the requesting court.

"(4) A commissioner of the requesting court may not take evidence pursuant to Article 17 of the Convention unless the Central Authority of the Land where the evidence is to be taken has given its permission. Such permission may be made subject to conditions. The local court in whose district official acts would have to be performed by virtue of a Letter of Request in the same matter shall be entitled to control the preparation and the actual taking of the evidence. Under the second sentence of Article 19 of the Convention, a member of the court may be present at the taking of the evidence.

"(5) The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

APPENDIX D

Rule 29.1 LISTING OF ALL PARENT COMPANIES AND SUBSIDIARIES (EXCEPT WHOLLY-OWNED SUBSIDIARIES) OF RÜTGERSWERKE AG

1. The following is the parent company of Rütgerswerke AG: Ruhrkohle AG.

2. The following are the subsidiaries (except wholly-owned subsidiaries) of Rütgerswerke AG: Ruberoid AG; Rütgers Kureha Solvents GmbH; Frendo S.p.A.; Giovanni Bozzetto S.p.A.; Industrias Quimicas del Urumea S.A.; Comercial Quimica del Urumea S.A.; MAS Electronics Ltd.; Th. Goldschmidt AG; Stratebau GmbH; Makadamwerk Schwaben GmbH; Südhessische Asphalt-Mischwerke GmbH & Co. KG für Straßenbaustoffe; Günther Wiedenhagen Isolierbaustoffe GmbH; Hansa-Asphaltmischwerke GmbH & Co. KG für Straßenbaustoffe; Essener Teerschotter GmbH; Spezialtiefbau Ferdinand Aufschläger GmbH; Sigeco GmbH Chemiehandel; Teerbau Italiana S.p.A.; Bilmac Ltd.; COBREQ-Companhia Brasileira de Equipamentos; BTM Baustoff-Technik & Mischwerke GmbH; Asphalt-Mischwerk Demmin GmbH & Co. KG; Aufschläger Spezialbau Magdeburg GmbH; AMN Asphaltmischwerk KG Straßenbaustoffe Nonnendamm GmbH & Co.; AMK Asphaltmischwerke Kiel GmbH & Co. KG; DBR Dortmunder Baustoffrecycling GmbH; RBR Reutlinger Baustoff-Recycling GmbH; TEGES Asphalt- und Baustoffaufbereitung GmbH & Co. KG; Rohrlec Gesellschaft für Rohrsanierung mbH; BRO Baustoffaufbereitungs- und Recyclinganlage GmbH Oldenburg; Baustoffrecycling-Zentrum Dresden Gittersee GmbH; AMK Asphaltmischwerke Kiel GmbH; BT

Bremsen-Tuning GmbH; Straßenbaustoffe Nonnendamm GmbH; Südhessische Asphalt-Mischwerke GmbH; TEGES Asphalt- und Baustoffaufbereitung GmbH Verwaltungsgesellschaft; Hansa-Asphaltmischwerke GmbH; OWB Gesellschaft für Baustoffrecycling mbH; ORL Baustoff Recycling GmbH; Asphalt-Mischwerk Demmin GmbH; FPK S.A.; Diagnosticum Ltd for Production and Distribution; CE.BO.TEX.-S.R.L.; TW Dorstrof GmbH; Moldeados Interiores S.A. de C.V.; Pipe Recon PTE LTD; IMPEXITAL Far East Ltd.; Ruhrkohle-Umwelttechnik GmbH (RUT); Entsorgungsgesellschaft mbH Gutlau; Rütgers Umweltservice GmbH; ANG Asphaltmischwerk Nentershausen GmbH; RSC Rohrbau und Sanierungs GmbH; ABB Bauwerkabdichtung GmbH; Teerfahrt GmbH; Paulal Speditionsgesellschaft mbH; Ateliers & Fonderias B.Piret S.A.; Italrom T.C. Textile Chemicals S.r.l.; Seppim S.A.; Eurodiag S.A.; Acoustec S.A.R.L.; REMY FRANCE S.A.; Abex Rail S.A.; BGB-Giovanni Bozzetto S.A.; Urpol-Urumea Portuguesa Industrias Quimicas Ltd.; Pagid UK Ltd.; VARIO spot.sr.o.; Pagid-Carlisle S.A. de C.V.; Rohr-Sanierungs-Bau GmbH; AWG Asphaltmischwerk GmbH Gauselfingen KG; AWG Asphaltmischwerk GmbH; Transportbeton GmbH Gauselfingen.

(2)

No. 94-865

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RÜTGERSWERKE, AG,

Petitioner,

v.

KAY BETTIS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 30, 1994

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Petitioner requests this Court to review a unanimous appellate court denial of its petition for a writ of mandamus. Petitioner does so in order that it may launch an attack -- never made in the courts below -- on

this Court's holding in Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987). Aerospatiale is sound in principle and workable in practice. The decision has been approved, followed and properly implemented by federal and state courts alike. The clear majority of post-Aerospatiale decisions, including the lower court rulings in this action, have ordered discovery under the federal rules, while a minority has required discovery pursuant to the Hague Evidence Convention. This is how it should be with any case-by-case analysis. No state supreme court or federal court of appeals -- apart from the case at bar -- has considered Aerospatiale. Only a handful of students and academics, unfamiliar with the workaday world of international discovery and litigation, along with a few practitioners furthering the interests of their foreign clients, have proffered any criticism.

Mandated discovery, pursuant to the Hague Evidence Convention[1] in every case, would create an unlevel playing field -- not only between foreign entities operating in the United States and their domestic competitors -- but also between foreign entities who utilize the federal discovery rules as a sword to obtain discovery from United States citizens, while simultaneously hiding behind the Hague Evidence Convention to shield themselves from identical discovery. There exist no "special and important reasons" to justify

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[1] Formally, The Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 255, T.I.A.S. No. 7444, 28 U.S.C.A. §1781 (1994).

this Court's exercise of discretion to review a magistrate judge's memorandum opinion and order implementing Aerospatiale in a discovery proceeding in a pending action. The bizarre posture of this case before this Court evidences petitioner's stratagem to appeal every adverse issue and to delay the trial in this five year-old certified environmental class action for as long as possible. This Court should not tolerate petitioner's misuse of the appellate courts. The petition for a writ of mandamus should be denied.

I. AEROSPATIALE WAS PROPERLY DECIDED AND HAS PROVEN WORKABLE IN PRACTICE.

Petitioner requests this Court to "reconsider and reverse its precedent" established only seven years ago in Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987). Petitioner brands this Court's holding in Aerospatiale "unsound in principle and unworkable in practice". Petitioner is wrong.

Not one United States circuit court of appeals, not one federal district court and not one state court has shared petitioner's view. Since 1987, of thirteen reported decisions applying Aerospatiale, petitioner concedes that three "have ordered litigants to use the Hague Evidence Convention procedures," while ten "have ordered litigants to use the federal rules". None of the state and federal courts which have implemented Aerospatiale have questioned its soundness in principle. Each has found the Aerospatiale's analysis workable.

The overwhelming majority of the reported decisions -- like the district court and court of appeals decisions in the cause sub judice -- have upheld the right to discovery under the federal rules. A minority of decisions have favored Hague Evidence Convention procedures. This split evidences the fact that courts are properly employing the case-by-case analysis posited in Aerospatiale. Notably, in two of the three states which have seen decisions in favor of first resort to the Hague Evidence Convention, subsequent court decisions in those same states have ordered discovery under the federal rules. Cf. Hudson v. Herman Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (Hague) with Haynes v. Kleinwefers, 119 F.R.D. 335 (E.D.N.Y. 1988) (federal rules), Scarminach v. Goldwell GmbH, 140 Misc.2d 103, 531 N.Y.S.2d 188 (1988) (federal rules), and Erbach Finance Corp. v. Royal Bank of Canada, 199 App.Div.2d 87, 605 N.Y.S.2d 52 (First Dept. 1993) (federal rules). Also cf. Knight v. Ford Motor Co., 260 N.J. Super. 110, 615 A.2d 297 (1992) (Hague) with Moake v. Source International Corp., 263 N.J. Super. 455, 623 A.2d 263 (1993) (federal rules). The district court and court of appeals decisions in the cause sub judice properly apply Aerospatiale in a manner consistent with this Court's holding and uniformly and unanimously reach a result consistent with the clear majority of decisions implementing Aerospatiale.

There is no reason, whatsoever, for this Court to reconsider, much less reverse, a seven-year-old decision which is based on sound principles and which has proven so workable in the federal district courts that there is not one reported post-Aerospatiale decision from any United States court of appeals, nor any petition requesting this

Court's reconsideration of Aerospatiale -- apart from this action. This case hardly presents to this Court "special and important reasons" justifying its exercise of discretion to grant petitioner's request for review.

II. THE JUDICIAL SYSTEM-ABUSING STRATAGEM EMPLOYED BY PETITIONER TO BRING THIS ISSUE BEFORE THIS COURT PRECLUDES PETITIONER'S ENTITLEMENT TO REVIEW.

Petitioner glosses over the bizarre machinations which it employed to bring this case before this Court. Petitioner asks this Court to review -- bottom-line -- a magistrate judge's memorandum opinion and order overruling petitioner's motion for a protective order as part of pretrial discovery in a pending civil action! The only case cited by the magistrate judge is Aerospatiale. Petitioner appealed that adverse ruling to the district court, which cited only one case in affirming the magistrate judge's decision: Aerospatiale.[2] Petitioner then filed a petition for a writ of mandamus in the Sixth Circuit Court of Appeals. The appellate court's order cited only one case addressing the merits of petitioner's

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[2] Prior to affirming the magistrate judge's memorandum opinion and order addressing Aerospatiale, the district court overruled petitioner's Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of in personam jurisdiction. The district court held that respondents -- even absent discovery from petitioner -- established a prima facie showing of an alter-ego relationship between petitioner and its wholly-owned United States subsidiary.

claim: Aerospatiale. The Sixth Circuit unanimously denied the mandamus petition, holding that petitioner had not established "a clear and indisputable right to relief in mandamus as a result of the district court's decision." In summary, this Court is being asked to review a unanimous appellate court denial of a petition for a writ of mandamus challenging a district court's affirmation of a magistrate judge's memorandum opinion and order denying a motion for a protective order. That is hardly an appropriate function for this Court in our jurisprudential system.

III. PIED PIPER-STYLE COMMENTARIES BY SOME STUDENTS, ACADEMICS AND PRACTITIONERS, WITHOUT ANYTHING MORE, ARE AN INSUFFICIENT BASIS FOR THIS COURT TO RECONSIDER AND REVERSE A RECENT DECISION THAT HAS BEEN WELL-RECEIVED BY EVERYONE ELSE, INCLUDING THE FEDERAL AND STATE COURTS.

Petitioner predicates its contention that Aerospatiale should be reversed on nothing more than a collection of articles -- which petitioner never cited below -- by some students, academics and practitioners criticizing Aerospatiale in Pied Piper fashion. The clear majority of those articles were written before, and thus fail to take into account, many of the thirteen -- with this case, fourteen -- reported decisions which establish the soundness and workability of this Court's holding. The critique of these students and academics is not shared by the very courts which have borne the responsibility for

implementing Aerospatiale on a case-by-case basis. Those courts have found little difficulty whatsoever in performing this relatively simple task.

The student-authors have no knowledge of the day-to-day workings of international discovery and the academics are usually divorced from the practice. As for those practitioners who have written on the subject -- they have often taken up the pen to further the undisclosed interests of their foreign clients. Those practitioners advocate -- bottom-line -- the proposition that foreign interests doing business in the United States may hide behind an impenetrable veil of corporate secrecy (in Germany, for example, where there is no such thing as pretrial document discovery) sewn by **their** sovereign to avoid precisely the full and fair discovery to which any United States corporation would be subject. If foreign interests doing business in the United States are not governed by the same judicial system and the same rules applicable to United States citizens, the playing field is unjustifiably and unfairly skewed. In this cause, for example, petitioner has repeatedly used the federal rules as a sword to obtain document discovery from respondents, while simultaneously using the Hague Evidence Convention in order to shield itself from identical discovery requests.

IV. PETITIONER NEVER ASSERTED, IN THE LOWER COURTS, THAT AEROSPATIALE SHOULD BE REVERSED. PETITIONER MAY NOT DO SO, FOR THE FIRST TIME, IN THIS COURT.

Petitioner never asserted, in the courts below, that Aerospatiale should be reversed. Indeed, petitioner consistently argued that Aerospatiale, properly applied, compelled the granting of the relief which it requested. Petitioner now switches its theory and -- for the first time, in this Court -- attacks Aerospatiale, urging not its implementation, but its reversal.

Petitioner is well-aware that this Court would not accept jurisdiction to simply review whether or not a lower court properly applied Aerospatiale to the facts before it. This Court should not countenance petitioner's stratagem of rewriting its position regarding Aerospatiale before this Court in an effort to cause this Court to accept jurisdiction which it otherwise would have summarily denied. Petitioner's first-time challenge to Aerospatiale in this Court is yet another reason which should compel this Court to refrain from any exercise of jurisdiction.

V. PETITIONER IS BEFORE THIS COURT ONLY TO DELAY, FOR AS LONG AS POSSIBLE, THE COMMENCEMENT OF TRIAL IN THIS FIVE YEAR-OLD, CERTIFIED ENVIRONMENTAL CLASS ACTION.

This certified environmental class action has been pending for nearly five years. Defendants are alleged to have contaminated, contributed to and furthered the contamination of, thirty miles of a pristine creek, wetlands and floodplain with toxic and hazardous chemicals, including a banned, carcinogenic pesticide which has been detected throughout the affected area and in the bodies of class members. Petitioner's appeals from every adverse ruling of the magistrate judge, petitioner's mandamus petition in the Sixth Circuit, and petitioner's petition for certiorari in this Court are all part of a master stratagem to delay the trial of this cause as long as possible -- while the class and the environment continue to suffer the effects of Ohio's largest environmental debacle. Indeed, even as its petition pends before this Court, petitioner continues to refuse to provide the discovery which the district court and the court of appeals have held must be produced.

CONCLUSION

The petition for certiorari should be denied. In no other case has this Court been asked to reconsider, much less reverse, Aerospatiale. Aerospatiale's soundness and proven workability is the reason why. Aerospatiale is

good law and the courts know it. Congress has known about Aerospatiale for seven years and has done nothing to criticize the decision or to legislate in the field. There are far more important issues for this Court to consider than petitioner's personal pique with a magistrate judge's memorandum opinion and order in a discovery proceeding in a pending action.

For all of the reasons posited above, petitioner's request for a writ of certiorari to review the appellate court's unanimous dismissal of petitioner's petition for a writ of mandamus to order a district court to reverse a magistrate judge's memorandum and order, and to require all discovery of petitioner to be pursuant to the Hague Evidence Convention, should be denied.

Respectfully submitted,

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In the

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Federal Republic of Germany ("Federal Republic") hereby moves for leave to file a brief as *amicus curiae* in support of petitioner Rütgerswerke AG pursuant to Sup. Ct. R. 37.2. The consent of the petitioner has been filed with the Clerk of this Court. Respondents Kay Bettis, *et al.*, have refused their consent to the filing of this *amicus curiae* brief. Attached as Exhibit A are the Federal Republic's letter to respondents and respondents' response declining its "invitation to consent" to the filing of this brief.

In 1978 this Court directed the Clerk of this Court to request the U.S. Department of State to inform foreign governments to make their views known to the Court in any case in which they have an interest by filing *amicus* briefs. In a circular diplomatic note dated August 17, 1978, the U.S. Department of State advised all Chiefs of Mission in Washington that

> The United States will consent to such a[n amicus] filing in any case in which it is a party. *In the unlikely event that any other party should decline consent, the Supreme Court will almost certainly grant the motion of a foreign government for leave to file a brief.* (emphasis added).[1]

Respondents' refusal to consent to the Federal Republic's presentation of its views to the Court lacks any justification. The Federal Republic respectfully requests permission to file this brief so that the Court may have the benefit of the Federal Republic's views on the interpretation of this important multilateral treaty dealing with international judicial assistance to which the Federal Republic and the United States of America are parties. The Federal Republic believes that it is in a strong position to comment on the issues tendered to the Court in the petition.

INTEREST OF THE AMICUS CURIAE

The Federal Republic is a member of the Hague Conference on Private International Law and actively participated in the negotiation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Evidence Convention" or "Convention"). The Federal Republic ratified the Convention on April 27, 1979, and the Convention is now in force between the Federal Republic and 24 states, including the United States of America. The signatories agreed in this Convention on the methods to be

[1] *Reprinted* in 73 Am. J. Int'l L. 124 (1979).

used in complying with requests for legal assistance to take evidence abroad recognizing the differences between the legal systems of the common law and civil law nations. The Federal Republic has a vital interest in the implementation of the Convention by other member states. It views with grave concern the manner in which the obligations undertaken by the United States under the Convention have been misinterpreted by the courts of the United States as a result of this Court's majority decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987) (hereinafter "*Aerospatiale*").

This Court alone has the authority and competence to foster the noble experiment embodied in the Evidence Convention. In a world where the flow of capital, goods and services transcends national borders and transnational litigtion has become commonplace, the states following the common law must find means to bridge the differences between their legal institutions and the civil tradition.

STATEMENT OF FACTS

Invoking the district court's federal question and diversity jurisdiction, the respondents brought a class action suit against petitioner's wholly-owned subsidiary, Ruetgers-Nease Chemical Co., Inc. ("Ruetgers-Nease") and one of Ruetgers-Nease's predecessor companies, Nease Chemical Co., Inc. ("Nease"). The original complaint sought compensation for environmental damage claimed to have been caused to respondents' properties abutting a plant site now owned by Ruetgers-Nease in Salem, Ohio. Plaintiffs subsequently added petitioner, as Ruetgers-Nease's corporate parent, as a defendant, and in their second amended and supplemental complaint respondents asserted claims against petitioner for $100 million dollars on respondeat superior and alter ego theories. Petitioner, Rütgerswerke AG, is a German corporation with its principal place of business in Germany and did not own the plant site that caused the alleged environmental damage at the

time. Petitioner acquired the properties of Nease and incorporated its subsidiary Ruetgers-Nease long after the plant causing the claimed environmental damage was closed.

Shortly after petitioner was joined to the action, respondents served on the petitioner their first discovery requests: 35 interrogatories, 43 document requests and a notice to depose a retired member of petitioner's board who resided in Germany. The discovery was stayed by the designated Magistrate Judge pending a ruling by the district court on petitioner's challenge to the court's personal jurisdiction over it.[2] In January 1992, while the stay was in effect, respondents served on petitioner a revised document request, almost trebling the number of categories of documents demanded (to 117). Some four months later, respondents served a third version of their document request, increasing the number of documents sought to 134 and a revised set of interrogatories numbering 49.

On three occasions petitioner sought protective orders from the Magistrate Judge supervising the discovery, and asked that respondents be required to employ the machinery of the Evidence Convention to obtain the information from Germany. The Magistrate Judge declined to enter such an order and directed that discovery proceed under the Federal Rules, stating that the question of the reasonableness of particular discovery requests would be addressed "if and/or when a motion to compel came for ruling the parameters [*sic*] of the discovery to be allowed." (Magistrate Judge's Memorandum Opinion and Order, May 6, 1994, Pet. App. at B-1). With only a passing reference to the Evidence Convention and the three-prong balancing test established by the *Aerospatiale* Court, the Magistrate Judge ruled that "the Federal Rules of Civil Procedure provide the preferable mode of discovery

[2]The district court subsequently denied petitioner's motion to dismiss the suit against it for lack of personal jurisdiction, but noted that plaintiffs had made out only a *prima facie* case for jurisdiction and will bear the burden of proof on this issue at trial.

herein," based on "the nature of the claim asserted . . . and the nature of the evidence which the [respondents] must adduce to establish their claim." (*Id.* at B-2).

The district court denied petitioner's appeal from the Magistrate Judge's Order.

> The Defendant correctly asserted that the Magistrate Judge did not use all the *Societe* criteria. However, modification of the Magistrate Judge's order is not necessary as long as it is not clearly erroneous or contrary to law.

Pet. App. at B-6.

Petitioner's application to the court below for a writ of mandamus was denied. The Court of Appeals ruled in relevant part —

> In the instant case, the law is clear that the terms of the Hague Convention on the Taking of Evidence are optional. [citing *Aerospatiale.*] The Supreme Court has not articulated specific guidelines for the application of the Hague Convention, but has indicated that the trial court must determine in each case based on the factors present in that case whether discovery against a foreign party shall proceed under the Hague Convention or the federal civil rules . . . The district court has made that determination in the instant case, and Rütgerswerke's petition does not establish a clear and indisputable right to relief in mandamus as a result of the district court's decision.

Pet. App. at A-2.

SUMMARY OF ARGUMENT

I.

In the view of the Federal Republic, the guidelines established by *Aerospatiale* have not had the intended effect of requiring the lower courts to balance the various interests and should be reexamined by the Court. The majority of this Court ruled in *Aerospatiale* that the Evidence Convention does not provide the exclusive or mandatory procedures for obtaining evidence physically located in the territory of other member states. It further held that international comity does not require that U.S. courts first resort to the Convention's procedures before allowing discovery under the Federal Rules. The majority, however, set out specific guidelines to be followed by lower courts in determining whether to resort to the Convention: to scrutinize the particular facts in each case, the sovereign interests of the state in whose territory the evidence is to be gathered, and the likelihood that such resort will prove effective. The Federal Republic's sovereign interest includes its interest in judicial sovereignty and the sphere of privacy guaranteed by its Constitution and domestic laws.

The practical results of the majority's decision can now be discerned through an analysis of the cases that have applied the Court's approach. To *amicus'* knowledge, of the fourteen cases that have been reported to date, only three have shown regard for the sovereign's interests in foreign court-ordered discovery on its own soil; the remaining cases have uniformly demonstrated hostility toward the Convention.[3] Those cases fail properly to address the issue of the foreign state's sovereign interest and improperly avoid use of the Convention by placing the burden of proof on the proponent of the Convention procedures. The instant case follows this improper practice and should be reversed.

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[3]The cases are summarized, *infra*, at pp. 10 et seq.

For these reasons, *Aerospatiale* should be reconsidered and its guidelines clarified to assure that a foreign state's sovereign interests are addressed and given appropriate weight, and that the burden of proof not be placed on the proponent of the use of the Convention.

II.

The 1993 Amendments to the Federal Rules add the requirement that discovery be provided without demand. These amendments can be adopted in full or in part by the district courts. Forum-shopping to the deteriment of foreign litigants will result. For this additional reason, the procedures of the Convention should be preferred.

III.

The Federal Republic subscribes to the original intent of the Convention, which was to devise a system that was both "tolerable" in the State of execution and "utilizable" in the forum where the action was pending. The Federal Republic cannot view the matter as tolerable when a U.S. court compels a party to give evidence within its territory that violates its laws. The theory proffered to justify this practice, that judicial jurisdiction over evidence is determined not by location of the evidence but by personal jurisdiction over a party with control over the evidence, does not comport with the Convention. In any event, absent resort to the Convention, the United States lacks the consent of the Federal Republic to compel activities within its borders.

ARGUMENT

I. AMICUS RESPECTFULLY URGES THE COURT TO REEXAMINE THE MAJORITY'S HOLDING IN AEROSPATIALE, SINCE EXPERIENCE NOW TEACHES THAT THE MAJORITY'S GUIDELINES ARE INADEQUATE AND AS A RESULT THE LOWER COURTS DO NOT PROPERLY BALANCE THE INTERESTS OF THE LITIGANTS AND THE FOREIGN GOVERNMENTS.

A. *Aerospatiale* Requires That In Making Discovery Rulings Courts Consider The Foreign State's General Sovereign Interest, Which, In Germany's Case, Includes Reserving The Taking Of Evidence To Judicial Authorities And Showing Greater Respect For Confidentiality Than Is The Case In The United States

The *Aerospatiale* Court's instructions to lower courts bear repeating:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See *Hilton v. Guyot*, 159 U.S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

482 U.S. at 546.

While the *Aerospatiale* Court rejected the argument that comity required first use of the Convention, the Court nevertheless stated:

> Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate. We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.

482 U.S. at 543-544, footnotes omitted.

The Federal Republic understands these instructions to mean that the courts must consider a foreign state's general sovereign interest, that is, its interest in protecting its judicial sovereignty and preserving the societal values embodied in its laws, and not just the interests of the parties to a particular litigation. The protection provided by the laws of the Federal Republic to personal privacy and business confidentiality is evidenced by the deeply rooted practice of reserving the taking of all evidence to judicial authorities. Three particular aspects of German procedure ensure that the judge, in exercising this authority, will not intrude on the constitutionally protected interests of the parties. First, German courts will not permit the taking of evidence that is not designed to "*prov[e]* plausible facts, but is rather designed to *produce* such facts."[4] Second, among the Constitutional and statutory privileges recognized by German law is the right to decline to testify about business secrets, professional confidences,

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[4]Heck, *Federal Republic of Germany and the EEC*, 18 Int'l Law. 793, 794 n. 25 (1984).

and matters that might implicate the rights of strangers to the proceedings. Third, German law narrowly circumscribes the occasions when a German court will compel the disclosure of documents. The ultimate source of the limits imposed on the scope of evidence taking is the German Constitutional principle of proportionality which mandates that "'the witness' sphere of privacy and other personal rights guaranteed under Art. 2, para. 1 together with Art. 1, para. 1 of the Basic Law [the Federal Constitution] may not be abridged by procedural law and its application by parties to a proceeding." 38 BVerfGE [Decisions of the Federal Constitutional Court] 105, 114 (1975).

B. Experience Teaches That Lower Federal And State Courts Do Not Respect The General Sovereign Interest of Foreign States And Improperly Place On The Foreign Litigant The Burden Of Showing That The Procedures Of The Convention Should Be Used.

Most of the reported post-*Aerospatiale* cases involving German defendants have given little or no weight to the Federal Republic's general sovereign interests. Thus, in *Haynes v. Kleinwefers & Lembo Corp.*,[5] the district court made no mention of the Federal Republic's sovereign concerns.[6] In *Scarminach v. Goldwell GmbH*,[7] a New York State court demanded that the German manufacturer show how a "specific" sovereign interest of the Federal Republic was implicated.[8]

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[5]119 F.R.D. 335 (E.D.N.Y. 1988)

[6]The court in *Kleinwefers, supra*, found that the interrogatories and production requests were not burdensome and denied Kleinwefers' motions that discovery be conducted under the Convention. *Kleinwefers, supra*, at 338-339.

[7]531 N.Y.S. 2d 188 (Sup. Ct. N.Y. 1988).

[8]The court concluded that the Convention did not preclude use of New York's discovery provisions. The court imposed on the German manufacturer, Goldwell, the burden of proof to show that resort to Convention

And in *Doster v. Carl Schenk A.G.*,[9] another district court required the German manufacturer to show how the "specific" discovery compromised German sovereign interests.[10] A New Jersey state court in *Moake v. Source Intl. Corp.*,[11] found no evidence in the record that the discovery requests would "generally" violate German sovereignty or that the Convention procedures would be a "more effective" means of obtaining the information.[12]

We wish to point out to the Court that requests for assistance to the United States from Germany outnumber requests from the United States to Germany by a factor of almost eight to one. See n. 28, *infra*. However, to our knowledge, there is no reported case where a German court has ordered a litigant to disregard U.S. judicial sovereignty or required a U.S. entity doing business in Germany to violate U.S. law by ordering that evidence be taken in accordance with the German law of procedure.

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procedures should be required. According to the court, Goldwell had failed to show how the discovery sought by plaintiff implicated a specific sovereign interest of West Germany. *Id.* at 190-191.

[9]141 F.R.D. 50 (M.D.N.C. 1991).

[10]The district court held in *Schenk, supra*, that the proponent of the Convention was in the better position to have the knowledge of any special sovereign interest and the benefits versus the problems of foreign discovery procedures. Without a showing of such interests or benefits, there was no reason why a U.S. court should compel a plaintiff to use the less liberal discovery procedures of a foreign country, thereby creating an unequal situation without good cause. *Id.*, at 51, n. 3.

[11]634 A.2d 263 (N.J.Super.App.Div. 1993).

[12]*Moake, supra*, at 461. The court reasoned (1) that it would create an inequitable asymmetry if the domestic party was required to answer interrogatories under local rules while a foreign party from a Convention state could take advantage of the more onerous provisions of the Convention, (2) that *Aerospatiale* did not interpret comity to subordinate the interests of American courts to a foreign nation whenever a discovery conflict arose, and (3) that the record contained no proof that the discovery generally would violate the sovereignty of the Federal Republic or that the Convention procedures would be more effective. *Moake, supra*, at 457-460.

In contrast, only two reported cases involving German defendants have required first use of the Convention. Both of these cases favored the *Aerospatiale* minority opinion over the majority opinion. The first case was *Hudson v. Pfauter*,[13] where a district court granted the German company's motion for a protective order and required the American plaintiffs to utilize Convention procedures to obtain answers to interrogatories. The court reasoned that the major obstacle to the use of the Convention was unfamiliarity with its procedures and noted that discovery under the Federal Rules was often wasteful.[14]

In the second case, *Knight v. Ford Motor Co.*,[15] a New Jersey state court granted a motion to add Siemens AG, a German corporation, as a defendant and ordered that discovery against Siemens proceed first under the Convention. The court took note that following the *Aerospatiale* Court's decision a Special Commission of the Hague Conference had supported giving the Convention priority over other procedures when evidence located abroad was sought. The Commission also acknowledged that a number of member states had limited their reservations with respect to the discovery of documents.[16] Emphasizing comity and the "special difficulties that may arise for foreign litigants in providing discovery under our U.S. domestic procedures," the court required use of Convention procedures until such time as the proponent of discovery could show that reasonable requests under the Convention were not being met with adequate response in a timely manner. In the Federal Republic's view, this is a minimum that *Aerospatiale* requires.

Cases involving German defendants have constituted a plurality (six out of 14) of the cases weighing the sovereign

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[13]117 F.R.D. 33 (N.D.N.Y. 1987).

[14]*Id.*, at 34, 38.

[15]615 A.2d 297 (N.J. Super. 1992).

[16]*Knight*, at 301 and n. 5.

interest in discovery disputes following *Aerospatiale*. It is fair to say that the sovereign interests of other states have received similar short shrift. See *Benton Graphics v. Uddeholm Corp.*[17] (no showing how a "specific" sovereign interest of Sweden was implicated); *Sandsend Financial Con.v. Wood*[18] (expressing "feeling" that discovery under Convention in Great Britain's Channel Island might be inadequate); *Rich v. Kis California, Inc.*[19] (French blocking statute imposing criminal sanctions entitled to little deference); *In re Bedford Computer Corp.*[20] (only effect of Convention's use in Israel was

[17]118 F.R.D. 386 (D.N.J. 1987). An American company charged that a Swedish specialty steel manufacturer had fraudulently substituted an inferior grade of steel for the steel contractually specified. The court interpreted *Aerospatiale* to place the burden of establishing which discovery procedure to utilize on the party advocating use of the Convention. *Uddeholm, supra*, at 389. Uddeholm's proffer as to Sweden's sovereign interest did not explain how any of the "specific" discovery sought by Benton inplicated any "specific" sovereign interest of Sweden. The court granted Benton's motion compelling responses to interrogatories and document requests pursuant to the Federal Rules. *Id.*, at 389-392.

[18]734 S.W. 2d 364 (Tex. App. 1988). The Texas appellate court denied a writ of mandamus seeking to require use of the Convention to obtain discovery in the Channel Islands of the United Kingdom. The trial court had explained its decision not to use the Convention as follows:

> I read the Supreme Court opinion with care, and there are obviously reasons the Court can feel that discovery needs to be expeditious, I need to go forward and that there might not be viable discovery from other procedures. That's exactly how I feel.

Id., at 366.

[19]121 F.R.D. 254 (M.D.N.C. 1988). The issue in *Rich* was whether a French corporation would be required to answer ten interrogatories relating to personal jurisdiction. The court cited *Aerospatiale*, "96 L.Ed.2d at 486," for the proposition that the proponent of using the Convention's procedures bears the burden of demonstrating the "necessity" for using those procedures, *Rich*, at 257.

[20]114 Bankr. 2 (Bkr.C.D.N.H.1990). There, an Israeli government instrumentality challenged the court's personal jurisdiction over it. The court cited *Rich* and adopted its reasoning. It substantially limited the requested discovery, found that the Israeli instrumentality had not shown that use of the Convention procedures would be "more effective" and that the only effect of using the Convention would be to delay the proceedings, and ordered that Federal Rules discovery be used. *Id.*, at 5-6.

delay); *In re Asbestos Litigation*[21] (Finnish affront at violation of its judicial sovereignty entitle to little weight because discovery under Federal rules more efficient); *Erbach Corp. v. Royal Bank of Canada*[22] (French blocking statute does not demonstrate a significant sovereign interest).

In re Perrier Bottled Water Litigation,[23] is the only non-German case known to us where use of the Convention procedures was ordered. The court found that France's prohibition of foreign discovery on French soil without resort to the Convention signified a strong sovereign interest in the use of the Convention's procedures and that there was no evidence in the record showing that Convention procedures would be ineffective. The court concluded that, should the procedures of the Convention prove unavailing, it would consider modifying its order.[24] — Again, the Federal Republic considers this as a minimum requirement of the Convention.

In the Federal Republic's view, the primary error that leads to the results in these cases is the lower courts' placing the burden of proof to show the sovereign interest on the propo-

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[21]623 A.2d 546 (Del. Super.1992). That case involved review of an Asbestos Master's discovery ruling. Partek, a Finnish corporation, objected to an order to produce documents under the Federal Rules rather than under the Convention on the grounds that the Master had addressed only one of the three factors required by *Aerospatiale* to be considered based on a general statement of Finland's sovereign interest submitted by a former Finnish judge. The court ruled that *Aerospatiale's* three factors constituted neither "minimal requirements" nor "the entire universe of relevant considerations," *Asbestos*, at 549-550, and affirmed the Master's decision as not clearly erroneous.

[22]605 N.Y.S.2d 52 (N.Y.App.Div. 1993). The appellate court, in a three paragraph opinion, affirmed the trial court's order that Banque Paribas produce documents located in France on the grounds that the French blocking statute had not "proved" to be a significant sovereign interest, citing *Rich*, n. 18 *supra*, and that resort to the Convention would frustrate prompt disposition of the matter made necessary by plaintiff's advanced age.

[23]138 F.R.D. 248 (D. Conn. 1991).

[24]*Id.*, at 354-354.

nent of the use of the Convention. *E.g., Uddeholm Corp., supra; Haynes v. Kleinwefers, supra; Scarminach v. Goldwell GmbH, supra; In re Bedford Computer Corp., supra; In re Perrier Bottled Water Litigation, supra; Doster v. Carl Schenk A.G., supra; In re Asbestos Litigation, supra;* and *Erbach Fin. Corp. v. Royal Bank of Canada, supra.* Indeed in *Rich v. Kis California, Inc., supra,* the court demanded that the proponent of the Convention show the "necessity" for its use.[25] *Contra, Knight v. Ford Motor Co.,* (rejecting the "rigorous" requirements of *Uddeholm*).[26]

This approach finds no support in the Convention, and not even in the majority's decision in *Aerospatiale.* The Court there required a *balancing* of factors, including the general sovereign interest, without any mention of the burden of proof. It may be reasonable to require the proponent to show how a *particular* discovery request implicates a sovereign interest of a foreign state, but the *general* sovereign interest should be a matter of judicial notice based on *Aerospatiale*'s teaching and the principle of international comity.[27] There should be no requirement that the foreign state intervene in each case and particularize its sovereign interests. For these reasons, we respectfully submit that *Aerospatiale* should be reconsidered and that lower courts be instructed that the general sovereign interest be specifically addressed and given great weight when a court is ruling on requests for discovery to be taken in a State that is a party to the Convention, and, in addition, that the burden of proof that the Convention be used not be placed on the foreign litigant.

The lower courts' decision in the instant case illustrates the advisability of reconsidering the *Aerospatiale* guidelines. Extraordinarily intrusive discovery designed to probe petitioner's

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[25]615 A.2d, at 258.

[26]*Id.*, at 257.

[27]See the concurring and dissenting opinion of Blackmun, J., in *Aerospatiale,* 482 U.S. at 547.

decision-making process in Germany was authorized to be taken in Germany without judicial intervention. No reference was made in any of the courts' rulings to Germany's general interest in judicial sovereignty or the "sphere of privacy or personal right" (38 BVerfGE, *supra*) that is guaranteed by the German Constitution. Rather, the burden of showing that the procedures of the Convention be used was placed on the petitioner. Germany respectfully submits that the result was inconsistent with the teachings of *Aerospatiale*, and *a fortiori*, with the Convention.

II. THAT THE 1993 AMENDMENTS TO THE FEDERAL RULES WILL ADD TO THE CONFRONTATION BETWEEN THE CIVIL AND COMMON LAW SYSTEMS IS ANOTHER REASON TO FAVOR USE OF THE CONVENTION'S PROCEDURES.

The Court should also note that the 1993 Amendments to the Federal Rules of Civil Procedure are bound to have a substantial impact on discovery against foreign parties. The obligation imposed by new Rule 26(a)(1), Fed.R.Civ.P., to disclose *to the opposing party, without even awaiting a request for discovery,* the names of witnesses and to provide copies of documents relevant to disputed facts, may prove yet another affront to the civil law tradition. In civil law countries, a party is required to disclose the evidentiary materials on which it intends to rely only *to the court*, not to the opposing party, and certainly not without a request.

The 1993 Rule amendments give to the district courts the option to adopt these new amendments in full or in part, or to reject them. Notes of Advisory Committee on Rules, 1993 Amendment to Rule 26, subdivision (a), paragraph (1). As observed by one German commentator, courts in the United States will now differ not only with respect to how and when to apply the *Aerospatiale* guidelines, but also as to whether they should follow the 1993 amendments. This, it is feared, will result

in chaotic forum-shopping to the detriment of foreign litigants. Reimann, *Beyond Fishing-Weitreichende Neuerungen im amerikanischen Discovery-Verfahren* [Extensive Innovations in American Discovery Proceedings], IPRax 1994, No. 2, at 155.

III. *AMICUS* IS OF THE VIEW THAT THE AEROSPATIALE DECISION DOES NOT, IN ANY EVENT, CONFORM TO ACCEPTED PRINCIPLES OF TREATY INTERPRETATION, AND THAT THE COURT'S DECISION SHOULD BE OVERRULED

The Federal Republic subscribes to the original intent of the negotiators of the Convention — an intent shared by the United States negotiators — that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Message of the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. at 11 (1972). If evidence is requested through the procedures agreed upon in the Convention, the procedure is "tolerable" in the Federal Republic because the evidence will be collected under the auspices of German courts, as mandated by the Federal Republic's domestic legal order. Consequently, where evidence is to be gathered or obtained in the territory of the Federal Republic, the Convention's use will benefit U.S. interests by providing the needed evidence, and will protect the Federal Republic's interests by avoiding intrusions upon its sovereignty. In this regard, the Federal Republic affirms its intent to construe the provisions of the Convention liberally in providing judicial assistance to the United States and the other member states of the Convention.[28]

[28]During the eight-year period from 1986-1993, 1,368 requests for judicial assistance were sent from Germany to the United States; during the same period, United States courts and litigants transmitted 184 requests to the Federal Republic. (Statistical data supplied by the Federal Ministry of Justice.)

One of the principal purposes of the Evidence Convention was to provide a bridge between national legal systems that would permit the production of needed evidence while eliminating intrusions of sovereignty and avoiding intergovernmental conflicts. A violation of the sovereignty of the Federal Republic occurs when a U.S. court compels a party, on pain of potentially severe sanctions, to take actions within the territory of the Federal Republic that violate its sovereignty and other provisions of its Constitution and its laws.

The Federal Republic cannot subscribe to the view that when a party is ordered to produce evidence from abroad, the discovery takes place only in the United States and not in the state where the evidence is located. The theory that judicial jurisdiction over evidence is determined not by the location of the evidence, but by the existence of personal jurisdiction over the party having control over the evidence, is inconsistent with the established German legal order and accepted principles of international law.

It can hardly be disputed that when evidence is sought from the territory of a foreign state for use in a United States court, activities within the foreign state will be required to prepare the evidence for transmission. That is the chief reason that the Convention was negotiated. Documents may need to be searched for, reviewed and photocopied, persons interviewed, and written responses prepared, all within the state where the evidence is sought. The view that the Federal Republic has no interest in activities within its borders preparatory to production of evidence in the United States is irreconcilable with the principle of territorial jurisdiction. As this Court so aptly stated early in its history that —

> *The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.* Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the ex-

> tent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812), emphasis added. Absent resort to the Convention, the Federal Republic considers that the United States lacks "the consent of the [Federal Republic] itself" to compel activities within its borders.

The majority opinion in *Aerospatiale* has effectively abrogated the duties of the United States not only to the Federal Republic, but to all countries that are members of the Convention. The Federal Republic is of the view that under the fundamental rule of ***pacta sunt servanda***, the United States, including its courts, is required to employ the procedures agreed upon in the Convention. To do otherwise is to breach the obligations of the United States as a nation, and risk endangering the viability of the Convention as a whole.

CONCLUSION

The failure by the courts below to order the use of the Convention procedures in obtaining evidence located in the Federal Republic is inconsistent with the obligations assumed by the United States when it ratified the Convention. Accordingly, the Federal Republic urges the Court to grant the instant petition for certiorari and to reexamine the majority's decision in *Aerospatiale* in light of the accumulated evidence that the vast majority of U.S. courts, in reliance on that decision, avoid resorting to the salutary provisions of the Evidence Convention.

Respectfully submitted,

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November 21, 1994

APPENDIX A

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October 3, 1994

Dennis E. Murray, Sr., Esquire
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Sandusky, Ohio 44871-0019

Re: *In re Rutgersweke AG*, Petition for Certiorari in the Supreme Court

Dear Mr. Murray:

We represent the Federal Republic of Germany which has requested that we file an *amicus* brief supporting the position of Rutgerswerke AG in its petition for certiorari to the Supreme Court. Pursuant to Supreme Court Rule 37, we ask your consent to the filing of such an *amicus* brief.

Sincerely

s/s Peter Heidenberger

Peter Heidenberger

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October 10, 1994

Peter Heidenberger, Esq.
BERLINER, CORCORAN & ROWE
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Washington, D.C. 20036-4798

Re: **Rutgerswerke AG, Petition for Certiorari in the Supreme Court**

Dear Mr. Heidenberger:

Our clients decline your invitation to consent to the filing of an *amicus* brief by the Federal Republic of Germany on behalf of Rutgerswerke AG in connection with Rutgerswerke's petition for certiorari to the Supreme Court.

Pursuant to Supreme Court Rule 37.2, consent is refused. If you advise us in writing that your client would like us to articulate the reasons supporting this position, we would be pleased to provide those grounds for your client's consideration and, perhaps, benefit. Please direct all future correspondence to our new address at 111 East Shoreline Drive.

Very truly yours,

MURRAY & MURRAY CO., L.P.A.
s/s
By: Kirk J. Belli Bovi

KJDB:mrf

Supreme Court, U.S.
FILED
DEC. 12 1994
OFFICE OF THE CLERK

No. 94-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RÜTGERSWERKE AG,

Petitioner,

v.

KAY BETTIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 12, 1994

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NO. 94-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RÜTGERSWERKE AG,

Petitioner,

v.

KAY BETTIS, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rütgerswerke AG ("Rütgerswerke") respectfully submits this reply brief in support of its Petition for a Writ of Certiorari (the "Petition") and in reply to the Brief of Respondents in Opposition to Petition for a Writ of Certiorari (the "Respondents' Brief").[1]

1. This case is properly before this Court.

Respondents contend that review by this Court is precluded because Rütgerswerke's Petition arises from the court of appeals' denial of a mandamus petition directed to the district court's denial of a motion for a protective order to

[1] Rütgerswerke refers to its Rule 29.1 listing included as Appendix D to its Petition. [Petition pp. D-1—D-2]. No amendments are needed to make the listing currently accurate.

require that all discovery from Rütgerswerke be taken pursuant to the Hague Evidence Convention. Respondents emphasize that the only case the lower courts cited in addressing the merits was *Societe Nationale Industrielle Aerospatiale* v. *United States District Court,* 482 U.S. 522 (1987). [Respondents' Brief pp. 5-6]. Respondents overlook that *Aerospatiale* likewise came to this Court through the denial by a court of appeals of a mandamus petition directed to a magistrate judge's order which denied a motion for a protective order to require that discovery be taken pursuant to the Hague Evidence Convention. 482 U.S. at 525-29. Issues involving the tension between the Hague Evidence Convention and federal discovery rules can originate *only* in the context of a discovery dispute, and naturally rise to this Court by the route taken in *Aerospatiale* and now followed by Rütgerswerke.

Respondents also contend that Rütgerswerke may not seek this Court's reversal of *Aerospatiale* because such reversal was not sought in the lower courts. [Respondents' Brief p. 8]. Respondents cite no authority in support of this contention, and there is none. This Court has made clear that the lower courts must follow this Court's precedents, and that this Court alone has the prerogative of overruling this Court's decisions. *See Rodriguez De Quijas* v. *Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.,* 460 U.S. 533, 535 (1983); *Hutto* v. *Davis,* 454 U.S. 370, 375 (1982). Petitioner need not ask a magistrate judge, or indeed any lower court, to overrule this Court's precedent in order to reserve the right to ask this Court to do so.

2. The Aerospatiale majority opinion is unsound in principle and unworkable in practice.

Respondents claim that because of the split between the ten reported lower court decisions which have ordered litigants to use federal rule discovery and the three decisions which have ordered use of the Hague Evidence Convention procedures, *Aerospatiale* has proven properly decided and workable in practice. [Respondents' Brief pp. 3-5]. The conclusion Respondents draw from these cases is incorrect. Precisely because *Aerospatiale* is unworkable, the three cases ordering Hague Evidence Convention discovery have taken the extraordinary step of following the *Aerospatiale* minority analysis. [Petition pp. 21-22]. If Rütgerswerke's motion for protective order had come before any of these courts, it doubtlessly would have been granted. In contrast, the decisions ordering federal rule discovery, including the lower court decisions in this case, have displayed a uniform pro-federal rules bias and an inability to perform the international comity analysis *Aerospatiale* requires. [Petition pp. 22-26]. Indeed, this split in the case law is the most compelling evidence that the lower courts are not following *Aerospatiale* at all, and that *Aerospatiale* therefore is unsound and unworkable.

Rütgerswerke has cited more than 30 commentaries which are critical of the *Aerospatiale* decision, while Respondents have cited *no* authority which suggests that *Aerospatiale* was correctly decided.[2] Respondents are incorrect in

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[2] Two of the principal commentators Rütgerswerke relies upon are George A. Bermann, Professor of Law at Columbia University, and Russell J. Weintraub, Professor of Law and Holder of the John B. Connelly Chair in Civil Jurisprudence at the University of Texas at Austin. The knowledge and experience of these commentators belie Respondents' contention that

(footnote continues)

asserting that Rütgerswerke seeks the reversal of *Aerospatiale* solely on the basis of these commentaries. [Respondents Brief pp. 6-7]. Rütgerswerke cites these commentaries not just for their authors' conclusions that *Aerospatiale* was decided incorrectly, but also because they elucidate the underlying deficiencies in the *Aerospatiale* majority opinion including its irreconcilability with: (a) the text of the Hague Evidence Convention [Petition pp. 10-13]; (b) the negotiation history of the Hague Evidence Convention [Petition pp. 13-14]; (c) the interests of the other signatory nations and the international community [Petition pp. 14-15]; (d) the 1989 Special Commission Report of the Hague Conference on Private International Law [Petition pp. 16-18]; and (e) the 1990 proposed amendments to the Federal Rules of Civil Procedure [Petition pp. 18-20]. Respondents make no response to any of these points and offer no grounds to support the reasoning of the *Aerospatiale* majority opinion.

Respectfully submitted,

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(footnote continued)

Rütgerswerke has cited "Only a handful of students and academics unfamiliar with the working world of international discovery and litigation, along with a few practitioners..." [Respondents' Brief p. 2].